Supreme Court, U.S.
FILED

962035 JUN 25 1997

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1996

VARSALONA'S ITALIAN RESTAURANT d/b/a BOOMER'S AND PATRICK VARSALONA,

Petitioners,

v.

CITY OF MARIETTA, BETTY L. HUNTER, M.C. PETE WALDREP, JR., DANIEL O. COX, SR., E. PAUL SABISTON, JAMES C. DODD, FRANK T. AYERS, PHILLIP GOLDSTEIN, AND ANSLEY L. MEADERS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

DAVID F. WALBERT
Counsel of Record
WALBERT & MATHIS
100 Peachtree Street
Atlanta, Georgia 30303
(404) 523-5000

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

95 PP

QUESTIONS PRESENTED

1. Where the evidence reveals that the predominant purpose behind a municipal ordinance is censorship, and that ordinance in fact restricts First Amendment expression, must the ordinance nevertheless be upheld whenever the municipality offers any pretextual reason for its action.

2. Do businesses and property owners lose the protection of the due process clause simply because their right to use their property for a particular purpose is subject to a licensing ordinance that requires annual license renewals.

LIST OF PARTIES

The parties to the proceedings below were the City of Marietta, Georgia, Betty O'Hunter, M.C. Pete Waldrep, Jr., Daniel O. Cox, Sr., E. Paul Sabiston, James C. Dodd, Ansley L. Meaders, and Frank T. Ayers, Mukesh Shretta, Gold Rush II, Inc. d/b/a Club Taj Mahal, James H. Tudor d/b/a Cypress Lounge, and Varsalona's Italian Restaurant d/b/a Boomer's, and Patrick Varsalona.

This case is one of three that were consolidated in the Superior Court of Cobb County, Georgia, and were decided in consolidated appeals to the Georgia Supreme Court.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	v
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
A. The Federal Questions Were Properly Raised Below, And They Have Been Ruled On By The Lower Courts	2
B. Statement Of Facts Material To The Issues	2
Argument	8
I. WHERE AN ORDINANCE INFRINGES UPON EXPRESSION PROTECTED BY THE FIRST AMENDMENT, A COURT SHOULD NOT UPHOLD THAT ORDINANCE BECAUSE OF SOME SUPPOSED "PURPOSE" WHERE, IN FACT, THE TRUE PURPOSE IS AN ENTIRELY DIFFERENT ONE AND WAS INTENDED SPECIFICALLY TO CENSOR PROTECTED SPEECH	8
II. BUSINESSES ACQUIRE MEANINGFUL DUE PROCESS RIGHTS WHERE THEY EXPEND SUBSTANTIAL SUMS IN RELIANCE ON A LICENSE, THEIR BUSINESSES ARE IN FACT LEGAL AND LICENSED, AND THEIR ANNUAL BUSINESS LICENSES ARE ROUTINELY RENEWED SIMPLY UPON APPLICATION	16
Conclusion	23

TABLE OF CONTENTS – Continued

Page

Appendix.....App. 1

Goldrush II, et al. v. City of Marietta, et al., Georgia Supreme Court, March 17, 1997 .....App. 1

Order of Georgia Supreme Court Denying Reconsideration, April 3, 1997 .....App. 32

Order of the Superior Court of Cobb County, April 2, 1996.....App. 33

Code of Ordinances of the City of Marietta, Georgia, § 8-5032.....App. 63

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. Utah County Board of Commissioners, 589 P.2d 1214 (Ut. 1979) 21

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)... 8, 14, 16

Barry v. Barchi, 443 U.S. 55, 65 n. 11 (1979) 20

Bell v. Burson, 402 U.S. 535 (1971)..... 20

Board of Regents v. Roth, 408 U.S. 564 (1972)..... 20

Bundo v. City of Walled Lake, 395 Mich. 679, 693, 238 N.W.2d 154 (1976)..... 22

City of Mobile v. Bolden, 446 U.S. 55 (1980) 14

Goldrush II, Inc. v. City of Marietta, 267 Ga. 683, 482 S.E.2d 347 (Ga. 1997)..... *passim*

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977)..... 14

Krueger v. City of Pensacola, 759 F.2d 851 (11th Cir. 1985)..... 14

Leone v. Towne of New Shoreham, 534 A.2d 871 (R.I. 1987)..... 21

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)..... 16

Mt. Healthy School District v. Doyle, 429 U.S. 274 (1977)..... 14

Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922)..... 16

Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir. 1997) (*en banc*) 15

TABLE OF AUTHORITIES – Continued

Page

Rogers v. Lodge, 458 U.S. 613 (1982) 14

Sanderson v. Village of Greenhills, 726 F.2d 284 (6th Cir. 1984) 22

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. I ..... *passim*

U.S. Const. Amend. XIV ..... *passim*

ORDINANCE:

Code of Ordinances of the City of Marietta, Georgia, § 8-5032 ..... *passim*

OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported as *Goldrush II, Inc. v. City of Marietta*, 267 Ga. 683, 482 S.E.2d 347 (Ga. 1997). This opinion is reproduced at App. 1. Reconsideration was denied on April 3, 1997, but with Justice Carley then joining the dissent. That order is reproduced at App. 32.

The decision and opinion of the Superior Court of Cobb County is unreported. It is reproduced at App. 33.

JURISDICTION

Petitioners seek review of the decision of the Supreme Court of Georgia rendered on March 17, 1997. (App. 1) The Supreme Court was petitioned for reconsideration of that decision, and that petition was denied on April 3, 1997. (App. 32) The jurisdiction of this court to review the judgment of the Supreme Court of Georgia is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves the First Amendment to the United States Constitution, which provides, "Congress shall make no law . . . abridging the freedom of speech, or of the Press. . . . "

This appeal also involves the due process clause of the Fourteenth Amendment to the United States Constitution, which provides, "No State shall . . . deprive any

person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This appeal also involves Section 8-5032 of the Code of Ordinances of the City of Marietta, Georgia. The text of this ordinance is set out at App. 63.

STATEMENT OF THE CASE

A. The Federal Questions Were Properly Raised Below, And They Have Been Ruled On By The Lower Courts.

The complaint in this action was filed on July 6, 1995. The complaint challenged the constitutionality of the ordinance at issue before this court, and petitioners sought to enjoin the enforcement and application of that ordinance to their property and business. The federal constitutional issues raised in this petition were fully asserted and ruled upon in the Superior Court. (App. 33-62)

On appeal to the Georgia Supreme Court, the constitutional issues presented by this petition were further preserved and asserted by petitioners. Each of the issues presented herein was expressly ruled upon by that court. (App. 13-28)

B. Statement Of Facts Material To The Issues.

The petitioners here commenced their business in March, 1991. That business included the sale of food, the sale of alcoholic beverages, and the operation of an adult

entertainment establishment that included nude dance entertainment. At the time petitioners commenced this business, extensive renovations and improvements on the property were undertaken to make possible the operation of the business. One of the plaintiffs in these consolidated cases expended approximately three and one half million dollars in establishing and preparing to open his business. The evidence is undisputed that, as a practical and economic reality, the property became suited and designed solely for this particular multiple use. The lease rate was increased substantially in reflection of the costs of these improvements, and a long-term lease was entered.

Petitioners' business required annual license renewal, but under the governing ordinances, that license was automatically renewable so long as the law was complied with. (App. 36) As a matter of fact, petitioners' license was indeed renewed automatically each year pursuant to this ordinance.

On January 19, 1995, the City of Marietta amended the pertinent licensing ordinance to make it impossible for the petitioners to operate the business that they had been operating since 1991. Under this new ordinance, petitioners could no longer permit nude expressive dancing activities on their premises if they maintained their other business operations, including specifically the serving and selling of alcoholic beverages. (App. 38) Pursuant to the amended ordinance, petitioners' business licenses expired on December 31, 1995. Since their business licenses could not be maintained beyond that date, the instant litigation ensued. They are currently operating under an injunction pending appeal.

In the trial court, the constitutional issues raised by petitioners were disposed of by summary judgment. The trial court rendered judgment in favor of the City of Marietta, upholding its ordinance. In support of its motion for summary judgment, the City argued that the ordinance was passed to address purported "secondary effects" of adult entertainment businesses, and the City relied upon the preamble to its ordinance that made such assertions.

In granting summary judgment, the Superior Court ignored abundant evidence in the record that the true purpose behind the ordinance had nothing at all to do with supposed "secondary effects" of this business, and that the true purpose, instead, was rank censorship. The evidence included, for example, a petition in support of the City Council's enactment of the amended ordinance, and the explicit purpose of this petition was directed at the First Amendment expression reflected by nude dancing. This petition, the object of which was admittedly censorship, was relied upon by the defendants in enacting the ordinance at issue. Further evidence of the censorship purpose behind the ordinance came from the testimony of Mayor Ansley Meaders herself, which was given by deposition. She openly expressed her personal opposition to nudity, and indicated no knowledge of any alleged "secondary effects" as a basis for her attitudes. Simply put, she was "personally opposed to nude dancing." (Meaders Depo., pp. 14, 21) She also acknowledged her statement to the press that it was her intention to deprive these businesses of the right to sell alcoholic beverages because doing so would destroy them. As she stated, "If liquor is not allowed in the clubs, then they

can't pay their bills." (Id.) As a matter of fact, Meaders' personal views were transformed into government action to censor First Amendment expressive conduct, nude dancing.

Council member Frank Ayers similarly admitted his wish that nude dancing would be eliminated from Marietta. Council member Phillip Goldstein admitted that the council members were dead set opposed to private nude dancing. (Goldstein Depo., p. 14) No question of any supposed impact on property values, "criminal activity," or the like was necessary to the opposition of these council members. Their motive in supporting and passing the ordinance at issue was their opposition to nudity and their desire to censor that expressive conduct.

In support of their motion for summary judgment, the City offered various "studies" from other cities concerning a purported connection between the adult entertainment industry and adverse effects on property values and the like. All of these studies, however, were five to ten years old; they came from cities that bore no apparent relationship to the City of Marietta, Georgia (cities such as Los Angeles, Houston, Phoenix, and Minneapolis); and the kinds of businesses in those other studies were not even the same as those represented by petitioners.

In adopting the ordinance, the City considered no testimony or evidence concerning the inapplicability of the studies to the City of Marietta, nor was there any discussion of any increase in crime resulting from the three existing adult entertainment facilities in Marietta. To the contrary, when asked, the Marietta Chief of Police

admitted that other areas of the City of Marietta had much higher crime rates.

Evidence was given to the trial court, in opposition to the motion for summary judgment of the City, that further showed that the methodology of these reports was so meaningless that it would have been impossible to have reasonably relied on that evidence. There was additional testimony that property values were not affected adversely in the area of petitioners' business. Evidence concerning the economic impact of other adult entertainment businesses in the North Atlanta area was introduced, and it showed clearly that property values in the vicinity of the Marietta clubs, among others, have increased in value. There was no neighborhood blight, and no increase in crime.

Further evidence of Marietta's true purposes behind the ordinance comes from the way in which it went about enacting the 1995 amendment. Although the City was well aware of the millions of dollars of investment that the club owners had made in their businesses, they kept secret from these businesses their intent to prohibit their business. The City Council members, instead, conspired with other elements in the community who wanted to eliminate nude dancing, regardless of its effects on the community. They were opposed to it as a form of expression, and needed to know nothing more before it was eliminated.

In pursuing this strategy, the City Council met on January 19, 1995 to receive supposed "evidence" in support of the ordinance, and they voted and adopted the ordinance at issue at that time. *It was not until the close of*

business the day before, January 18, 1995, that any notice was given to petitioners – and similarly situated businesspersons – that an ordinance was being considered and might be adopted the very next day. While the City was keeping its plans secret from affected property owners and businesspersons, a draft copy of the secret ordinance was being circulated among various churches in the Marietta area as part of the strategy to enact the law through a "stealth" campaign.

If the censorship purpose of the Marietta ordinance was not apparent enough from the record, this extremely irregular procedure would speak volumes. It can safely be said that, if the true concern of the City of Marietta in adopting this ordinance was possible "secondary effects" of the petitioners' business, the City would surely have investigated the ordinance amendment in a normal, deliberate fashion. It is literally unprecedented for the City Council to "sneak up" on property owners like it did in this case. The reason for their conduct in this instance is apparent: the aim of the City was not to regulate any kind of "secondary effects" of adult entertainment business, but to eliminate nude dancing from the City *simply because the City Council members were opposed to that form of expression.*

Notwithstanding the evidence that impugned the alleged purpose of the City of Marietta in enacting the ordinance at issue, the Superior Court granted summary judgment. In so doing, it accepted uncritically the pretext offered by Marietta. The Superior Court did not even have a hearing to make findings of fact concerning what the true purposes behind the enactment of the ordinance

were. The Supreme Court of Georgia affirmed the Superior Court over the dissents of Justice Sears and Carley.

ARGUMENT

I. WHERE AN ORDINANCE INFRINGES UPON EXPRESSION PROTECTED BY THE FIRST AMENDMENT, A COURT SHOULD NOT UPHOLD THAT ORDINANCE BECAUSE OF SOME SUPPOSED "PURPOSE" WHERE, IN FACT, THE TRUE PURPOSE IS AN ENTIRELY DIFFERENT ONE AND WAS INTENDED SPECIFICALLY TO CENSOR PROTECTED SPEECH.

This court has not addressed a case involving nude dancing and the First Amendment issues presented by such expressive nudity since *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). In *Barnes*, eight of the nine then-sitting Justices agreed that there is expression inherent in nude dancing that warrants some degree of First Amendment protection. However, there was no majority opinion in *Barnes*, which was decided by a five to four vote. Furthermore, three of the Justices who participated in *Barnes* are no longer sitting on the court. Because *Barnes* yielded no majority opinion and provided less than clear guidance, the decisions of the lower federal and state courts concerning the regulation of nude dancing have been very inconsistent since *Barnes* was decided.

Of even greater significance, following the *Barnes* decision some local jurisdictions have sought to enact

ordinances designed to severely limit or prohibit expression involving nude dancing. Those ordinances are routinely accompanied by formalistic adoption of a statement of legislative purpose designed to mimic some of the possible purposes suggested by Justice Souter, in his concurring opinion in *Barnes*, that might warrant restrictions on nude dancing. In so acting, local governing bodies have often followed a pre-packaged "legislative purpose" and "legislative history" formula that is designed not to honestly and genuinely express the legislative purpose behind such legislation, but rather to create a trail that would suggest that legitimate purposes, as recognized by Justice Souter's opinion, actually motivated the legislation. That is precisely what occurred in this case.[1]

Although the real purpose behind the ordinance here was simply to censor and suppress that free expression

---

[1] The *Barnes* decision has been universally criticized in the academic journals, in large part because it may permit exactly the kind of disingenuous charade by local government that occurred here. *See* R. Kalyan, *Regulation of Nude Dancing*, 99 Dick.L.Rev. 169 (1994); M. Martin, *An Analysis Of Nude Dancing Under Barnes v. Glen Theatre, Inc.*, 77 Wake Forest L.Rev. 1061 (1992); C. Joe, *Can We Express Ourselves Dancing Naked?*, 46 S.M.U.L.Rev. 263 (1992); V. Blasi, *Six Conservatives In Search Of The First Amendment: The Revealing Case Of Nude Dancing*, 33 Wm. & Mary L.Rev. 611 (1992); S. Moss, *Stripping Nude Dancing Of First Amendment Protection*, 31 Wash.L.Rev. 618 (1992); E. Urschel, *Nude Dancing, Expressive Conduct, And The First Amendment*, 20 Hast.Const.L.Q. 467 (1992); I. Campagne, *Barnes v. Glen Theatre, Inc.: Application Of Indiana's Public Indecency Statute To Nude Dancing*, 25 Loy.L.A.L.Rev. 595 (1992); Z. Fardon, *Nude Dancing And The First Amendment Question*, 45 Vand.L.Rev. 237 (1992).

represented by private nudity, the Superior Court and the Supreme Court of Georgia deferred entirely to the ritual statement by the City of Marietta that the ordinance was passed for other purposes. In deferring to the City's asserted purposes, the Georgia courts ignored all evidence in the record that proved that censorship – rather than purported "secondary effects" – was the true motivating purpose behind the legislation at issue. Indeed, the Superior Court did not even allow a trial on the issue of purpose. Rather, it granted summary judgment to the City of Marietta, accepting its asserted purpose as conclusive, notwithstanding contrary evidence.

By allowing government to misrepresent its true purposes in constitutional litigation of this sort, the Fourteenth Amendment and the legal system are done a great disservice. Our system of law and justice is based upon truth and candor. But those critical pillars of the Constitution are fatally undermined when a city can defend its ordinances – which on their face restrict First Amendment expression – by offering up stated legislative purposes that, in fact, bore no relation to truth. Where a court rubberstamps restrictive legislation in such circumstances, the legal system inevitably brings disrespect upon itself.

In the record of this case, there was abundant evidence that the true purpose behind the ordinance was censorship, plain and simple. Had a trial been allowed, petitioners (and plaintiffs in the other cases that were consolidated with petitioners') would have shown conclusively that the purported evidence supporting Marietta's alleged "secondary effects" was completely specious. Petitioners were allowed no such opportunity.

Instead, the City's simple assertion of a purpose was allowed to trump all evidence and all contrary claims.

In determining the issues in this case, the Supreme Court of Georgia correctly recognized that nude dancing carries with it constitutionally protected expressive conduct:

> Marietta's ordinance amendment is "content-neutral" legislation if it is "justified without reference to the content of the regulated speech." When adult entertainment establishments are involved, the "regulated speech" is the constitutionally-protected expressive conduct of nude dancing. The principal inquiry in determining whether a legislative act is content-neutral is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys. *The government's purpose is the controlling consideration.* A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." (App. 13) (emphasis added; citations omitted)

In so holding, the Georgia Supreme Court correctly stated the rule expressed in this court's *Barnes* decision. But in applying this test, the majority opinion of the Georgia Supreme Court adopted an approach that renders this constitutional principle meaningless. Finding that the City of Marietta offered at least a pretense that the purpose of the ordinance was to "combat secondary effects," the court refused to go further and look at the actual evidence of purpose.

For example, the court relied on the fact that the ordinance included a preamble which recited purported findings, such as law enforcement concerns and adverse property values, that were supposedly associated with this particular form of First Amendment expression. (App. 14-15) In fact, abundant evidence was presented to the City of Marietta, and to the Superior Court, that the purported "secondary effects" from nude dance expression were entirely mythical. The evidence showed, for example, that property values in the vicinity of these businesses had increased in value; that there was no increase in crime whatsoever; and that there was nothing remotely like "neighborhood blight" in the vicinity of any of the clubs at issue. What the evidence taken fairly as a whole showed, were facts very different than what was *assumed* by the Superior Court on summary judgment, and accepted by the Supreme Court.

Namely, the *real purpose* of the ordinance at issue was precisely what the First Amendment prohibits. Rather than being content-neutral, the ordinance was passed specifically and primarily for the purpose of eliminating this particular form of expression. The notion of legislating any supposed "secondary effects" of nude dancing was a ruse, a ruse designed simply to attempt to fit Marietta within the formula suggested by Justice Souter's concurring opinion in *Barnes*.

To allow government – here, the City Council of Marietta – to override its citizens' First Amendment rights by claiming ulterior purposes where those purported purposes are disingenuous, renders the supposed protection of the First Amendment utterly meaningless.

The rule followed by the Supreme Court of Georgia permits the state and its municipal governments to censor and ban expression simply and solely because those elected disagree with that expression. While it may be that, in some cases, the majority of the electorate also disagree with the banned expression, it is in just such cases that the First Amendment is designed to prohibit government censorship. Unpopular speech – whether it be political, racist, leftist, or that expression inherent in nude dancing – is entitled to some degree of First Amendment protection. That protection is reduced to a pointless triviality where government can directly ban expression under the false pretense of regulating supposed "secondary consequences" of that expression.

Hostile political speech, for example, may often carry with it the possibility of confrontation. Confrontation may lead to disturbances, disturbances can lead to fights, and fights constitute criminal activity. Under the approach adopted by the Georgia Supreme Court here, the government's asserted fear that extreme political speech (whether it be leftist or rightist, racist, integrationist, or whatever) might lead to such criminal acts, would provide a sufficient basis for banning that speech. That would be true even if the asserted basis was a ruse, and the government's real purpose was simply to censor speech that it disagreed with.

In no other area of the law where the purpose of government action is a relevant issue, can that purpose be unilaterally determined by the pronouncement of the government itself. For example, in neutral appearing legislation where racial purposes are at issue, the government's assertion of a legitimate purpose is never

determinative. To the contrary, a full evidentiary inquiry is appropriate, and the purpose finding of the trial court – based on all the evidence – controls. Compare *Rogers v. Lodge*, 458 U.S. 613 (1982), with *City of Mobile v. Bolden*, 446 U.S. 55 (1980). A full evidentiary inquiry is normally required where government conduct is attacked as being motivated at censoring the expression of its employees. *Mt. Healthy School District v. Doyle*, 429 U.S. 274 (1977). That is also the rule in cases arising under the commerce clause, where the issue is whether a state is intentionally discriminating against foreign commerce. *See, e.g., Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977).

There is conflict in the law today largely because there was no majority opinion in *Barnes*. The Georgia Supreme Court decision, for example, contradicts the federal court of appeals decision that controls in the same area of the country. In *Krueger v. City of Pensacola*, 759 F.2d 851, 855-56 (11th Cir. 1985), the court was faced with zoning restrictions on topless dancing. That court inquired into the *true purpose* behind the ban, and determined whether anything like the "secondary effects" discussed in *Barnes* motivated the ordinance, or whether the ordinance was really motivated by a desire to eliminate such expression. Based on all of the evidence, including a review of the tape recordings of the council meeting where the ordinance was adopted, the court concluded that the primary purpose was one of censorship, and the ordinance was stricken because of its illegitimate purpose. The government had acted based on its perception of "the morality of topless dancing and the propriety of having such activity going on next to [a] church." *Id.*

In a recent Third Circuit decision, the court required similar legislation to be justified with "real" evidence of purpose and effect. *Phillips v. Borough of Keyport*, 107 F.3d 164 (3d Cir. 1997) (*en banc*). At issue there was an adult entertainment ordinance, and the court held that the constitutionality of the ordinance could not be determined on a bare record. Rather, if the ordinance was to survive, the local government had to provide evidence of the supposed "secondary effects" with some real and substantial particularity, and there had to be a real "record for the existence of those effects and for the Ordinance's amelioration thereof." *Id.* at 175. At the same time, of course, the plaintiffs were to be allowed a real opportunity to offer evidence undermining the City's contentions, with the District Court to determine the actual facts.

Petitioners respectfully submit that the law is disserved where government is allowed to obliterate the First Amendment expressive rights of its citizens through a charade. The First Amendment and this court's decision in *Barnes* mean nothing if government and the courts can do what occurred here. To hold that the mere assertion of some purpose is sufficient to justify an ordinance that directly prohibits First Amendment expression – regardless of what the true purpose may be – is to reduce the law to a meaningless formalism. The majesty of the First and Fourteenth Amendments requires more.

II. BUSINESSES ACQUIRE MEANINGFUL DUE PROCESS RIGHTS WHERE THEY EXPEND SUBSTANTIAL SUMS IN RELIANCE ON A LICENSE, THEIR BUSINESSES ARE IN FACT LEGAL AND LICENSED, AND THEIR ANNUAL BUSINESS LICENSES ARE ROUTINELY RENEWED SIMPLY UPON APPLICATION.

Prior to the ordinance change at issue here, it is undisputed that petitioners' license would be automatically renewed annually. As the Georgia Supreme Court noted, the City could refuse to renew the license only if there were grounds therefore, such as a violation of state or federal law. (App. 22) Although recognizing that petitioners had this renewable expectation in their business license – under the then-existing Marietta ordinance – the court nevertheless held that petitioners had no due process rights, simply because they had to obtain a new license each year.

The Supreme Court of Georgia correctly recognized that the government cannot retroactively eliminate the right to use one's property *carte blanche*. "Under both the federal and state constitutions, one may not be deprived of life, liberty or property by the government without due process of law." (App. 18) Where the use of one's property is legal one day but that use becomes prohibited the next day, due process questions are necessarily implicated. The government can go only so far in imposing such use restrictions retroactively. As this court has held for decades, government regulation of the use of property is unconstitutional where it goes "too far." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). That rule was applied recently in *Lucas v. South Carolina Coastal Council*,

505 U.S. 1003 (1992). There, regulatory action transgressed the due process rights of property owners because the regulations were so onerous.

This rule was recognized by the Georgia Supreme Court in holding that retroactive legislation could not deprive property owners of their vested rights.

> In order to address appellants' contention that the 1995 amendment to Marietta's ordinance is an unconstitutional retrospective law, we must determine whether appellants have a vested property right in the renewal of their licenses because "our Constitution forbids passage of retroactive laws which injuriously affect the vested rights of citizens." . . . Generally, laws enacted pursuant to the police power for the public's protection may be modified without violating a constitutional prohibition against retrospective statutes. However, even modifications to police power enactments cannot impinge upon vested rights. (App. 19-20) (Citations omitted)

It is at this point that the Georgia court went amiss. In determining whether there was a "vested" property right entitled to due process protection, the court held that no such right existed because the only "right" at issue was that of an annual renewable license. This holding elevates form above substance, and reduces one's due process property rights to a fiction.

Justice Sears of the Georgia Supreme Court, joined in dissent by Justice Carley, wrote that the majority's distinction between property regulated by "licensing" and property regulated by "zoning" was a distinction without a difference:

> Although the majority implies [that] appellants . . . would have acquired vested rights if the City of Marietta had chosen to regulate adult entertainment by way of a zoning ordinance, the majority holds that the appellants acquired no right to continue their businesses since the City chose to regulate adult entertainment pursuant to a licensing scheme. I disagree with this holding and therefore dissent.
>
> . . . .
>
> I find no rational reason to treat an adult entertainment ordinance like the one in this case any differently from a zoning ordinance for purposes of determining vested rights. . . . [Zoning] regulations, like licensing regulations, are subject to change at any time that the local government believes that the change would promote the general welfare of the community. [T]he adult entertainment ordinance in this case is in fact a combination zoning/licensing scheme, containing numerous traditional zoning features. Finally, here, unlike many licensing regulations . . . the adult entertainment ordinance was amended so as to entirely preclude the businesses that the appellants had been operating. . . . (App. 29-30)

Under the majority's approach, once the government establishes a regulatory system under its police power that includes the use of licenses, due process rights effectively vanish. The license itself becomes the "property" interest under this analysis, and the traditional rights inherent in ownership of property become meaningless.

While this radical interpretation of constitutional due process rights does have some support in the decisions of other courts, the better reasonsed cases agree with Justice Sears' dissent in this case. *Certiorari* should be granted so

that this court may address this important issue and decide whether property rights may be perfunctionarily eliminated by simply overlaying a licensing system on existing property uses.

While acknowledging that retroactive application of a new zoning ordinance may be unconstitutional where an existing legal use is prohibited, the majority opinion of the Georgia Supreme Court held that this same principle "is not applicable to *licenses* to conduct a business." (App. 27) (emphasis added) This sharp distinction between the right to use property under a licensing ordinance and a zoning ordinance was rationalized as follows:

> [T]his court [has] distinguished between a business license and a building permit, holding that issuance of the latter, "a device for ensuring compliance with zoning ordinances" created a vested right in existing zoning ordinances, but that procurement of a business license, "typically not a device for insuring compliance with zoning ordinances," did not bestow vested rights upon the holder. We continue to adhere to the distinction and conclude that appellants' expenditure of funds in reliance upon the city's annual issuance of liquor and adult entertainment licenses to them did not endow them with a vested right to remain in business under the licensing regulations in existence at the time appellants received their initial licensing. *Those who hold licenses that expire annually act at their peril and assume the risk that their licenses might not be renewed notwithstanding they have "committed their lives and their capital to building their businesses" which need licenses to operate.* (App. 27) (emphasis added)

In so holding, the Georgia Supreme Court has established a dangerous precedent. The court has obliterated the traditional protection property rights receive under the due process clause. The court does this by, in effect, transferring the right to control one's property from the owner *to the government itself as the issuer of a license.* This radical holding – which met with two dissents – directly contradicts past decisions of this court.

The "right-privilege" dichotomy has long been held insufficient to determine whether due process property rights are at issue. *Bell v. Burson*, 402 U.S. 535 (1971). "[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972).

While it is true that, under the ordinance scheme at issue here, petitioners did have to renew their license each year, the fact is that license renewal was neither discretionary nor tenuous. To the contrary, license renewal, under the express language of the ordinance – and under the actual practice that existed – was expected each and every year. This court has indicated previously that a licensee may have a "legitimate claim of entitlement" to his property interests where the license at issue may be suspended or non-renewed only where some kind of regulatory violation occurs. *Barry v. Barchi*, 443 U.S. 55, 65 n. 11 (1979). The lower court's majority holding in this case, that there is no property right worthy of constitutional protection under such circumstances, would work radical surgery on the due process clause.

A case cited by the court below, *Leone v. Towne of New Shoreham*, 534 A.2d 871 (R.I. 1987), supports the petitioners' contentions here. Among other things, *Leone* held that a licensee possesses an entitlement protected by due process if the license is revocable only upon proof of misconduct. The Rhode Island Supreme Court held that:

> Licenses granted by the government represent property. . . . Deprivation of that entitlement, as in the failure to obtain a license renewal, requires a procedural hearing with due-process guarantees, because the continued possession of a license may become essential in the pursuit of a livelihood. *Id.* at 873.

The court further held what should be obvious under the Constitution, but which the Georgia court here disregarded:

> Refusing to renew a license has similar effects on a going business as the revocation of a license. When one makes an investment in a business, as the [appellants] have, one expects to be able to continue to operate it. *Id.*

The Utah Supreme Court reached the same conclusion in the context of a local government's refusal to renew a liquor license. *Anderson v. Utah County Board of Commissioners*, 589 P.2d 1214 (Ut. 1979).

> The spirit of enterprise which impels a person to initiate and develop a business which provides services to the public and employment for others is vital to the common welfare. By the same token that a business must operate in accordance with lawful regulations and requirements, it should be the policy of the law, and the officials charged with its administration, to

> encourage such enterprise by according it all proper protections of the law. In harmony with that purpose there should be considerable difference in determining whether an applicant's renewal license should be granted, as compared with the renewable license where the business has been established and operating for a number of years. 589 P.2d at 1216.

Other state and federal appellate courts that have come to the same conclusion include *Bundo v. City of Walled Lake*, 395 Mich. 679, 693, 238 N.W.2d 154, 160 (1976) (holding that a liquor license holder who had been renewed without incident for several years, and who reasonably relied upon a licensing practice which provided for renewal as a matter of course in most instances, had a property interest which entitled him to due process protection in connection with the continued issuance of that license.); *Sanderson v. Village of Greenhills*, 726 F.2d 284, 286 (6th Cir. 1984).

The petitioners respectfully submit that the radical and dangerous nature of the instant Georgia precedent is apparent when one considers the ever expanding scope of property regulation and licensing by federal, state, and local government. The rationale of the Georgia court here will effectively place all of the traditional "bundle of rights" that go with property ownership outside the due process clause. Whenever government control of property under the police power comes through a licensing scheme – rather than, for example, a zoning ordinance – due process considerations would be circumvented. So long as the license is renewable every year, the licensure route would literally suspend constitutional protections under the due process clause. The criteria for continued use

could be changed arbitrarily, and all due process restraints would be avoided.

While the court's opinion is admittedly not without some precedent in other states, it runs against the majority of the decisions of other courts. *Certiorari* is warranted here to clarify the application of the due process clause to such cases, and to ensure that the rights of property owners like petitioners – and thousands of other persons who may use their property in some other way pursuant to licenses in Georgia and other states – are not denied.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this court issue a writ of certiorari to the Supreme Court of Georgia in this case and review the decision of that court on the merits.

Respectfully submitted,

WALBERT & MATHIS

DAVID F. WALBERT
100 Peachtree Street
Suite 1400
Atlanta, Georgia 30303
404/523-5000

Attorneys for Petitioners

Counsel of Record

In the Supreme Court of Georgia

Decided: March 17, 1997

S96A1494. GOLDRUSH II et al. v. CITY OF MARIETTA et al.

S96A1496. VARSALONA'S ITALIAN RESTAURANT d/b/a BOOMER'S et al. v. CITY OF MARIETTA et al.

S96A1497. TUDOR d/b/a CYPRUS LOUNGE V. CITY OF MARIETTA et al.

BENHAM, Chief Justice.

Appellants are establishments which provide adult entertainment and are located within the City of Marietta. For several years, each establishment has applied for and received annual licenses issued by the City authorizing the businesses to provide adult entertainment and to serve alcoholic beverages.[1] In January 1995, acting pursuant to the authority granted by a 1994 amendment to the Georgia Constitution, the Marietta City Council passed an amendment to the city's adult entertainment ordinance which amendment provided that a liquor license would not be issued for a location at which was performed entertainment that required the issuance of an adult entertainment license. In effect, the amended adult entertainment ordinance banned alcohol in adult entertainment establishments by requiring an applicant to choose between obtaining a liquor license or obtaining a license to provide adult entertainment. The amended ordinance also provided that licenses previously granted

---

[1] Cyprus Lounge had adult entertainment and liquor licenses for 1992, 1993, 1994, and 1995; Boomer's had the necessary permits for 1991, 1992, 1993, 1994, and 1995, and Goldrush II for 1993, 1994, and 1995.

would not be subject to the amendment until December 31, 1995, "at which time all licensees within the City of Marietta shall be subject to this provision, including those licensees licensed before the effective date hereof."

Following passage of the 1995 amendment to the city's adult entertainment ordinance, each of the appellants filed a separate action against the city, its council members, and its mayor, seeking a declaratory judgment on the constitutionality of certain provisions of Marietta's ordinances; injunctive relief against enforcement of the ordinances; and damages. Appellant Cyprus Lounge also sought a writ of mandamus requiring the city to issue to it ad lt entertainment and liquor licenses for 1996. The trial court consolidated the three cases and, after an extended hearing, granted summary judgment to the defendants and denied injunctive relief to the plaintiffs. Each of the businesses and the person to whom the adult entertainment and liquor licenses were issued appealed the trial court's judgment to this Court, and we have consolidated the three appeals.[2]

1. The 1995 Marietta ordinance amendment was enacted following the ratification of an amendment to the Georgia Constitution which is now embodied in Art. III, Sec. VI, Par. VII. The constitutional amendment gives the State of Georgia "full and complete authority to regulate alcoholic beverages and to regulate, restrict, or prohibit activities involving alcoholic beverages[,]" including the regulatory authority given the States by the Twenty-first

---

[2] According to the trial court's order, the parties agreed in December 1995 that the businesses could continue to serve alcohol and provide adult entertainment pending resolution of appeals filed in this court.

Amendment to the U. S. Constitution. The constitutional amendment goes on to delegate this regulatory authority to the counties and municipalities of Georgia "for the purpose of regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages. . . . " Before the trial court, as well as on appeal, appellant Boomer's contends that the constitutional amendment is a fatally overbroad unconstitutional infringement upon the freedom of expression guaranteed by the First Amendment to the U. S. Constitution.

The constitutional amendment's authorization to the State to "regulate, restrict, or prohibit activities involving alcoholic beverages" and its delegation of regulatory authority to local governments to regulate, restrict, or prohibit nudity, partial nudity, or depictions of nudity, without regard to whether the activity limited or the nudity proscribed is constitutionally protected, run counter to the holdings in *Harris v. Entertainment Systems*, 259 Ga. 701 (386 SE2d 140) (1989), and *Pel Asso, Inc. v. Joseph*, 262 Ga. 904 (427 SE2d 264) (1993). In those cases, this court found a statute and an ordinance overbroad because one went beyond "prohibiting nude dancing in bars" and the other applied to mainstream performance houses and private conduct as well as barroom nude dancing. Despite the appearance of similar overbreadth in the 1994 constitutional amendment, we decline to brand the constitutional amendment as unconstitutionally overbroad because we perceive a fundamental distinction between it and the statute and ordinance which were found lacking in *Harris* and *Pel Asso*: the

constitutional amendment is not a self-executing amendment, but requires the passage of legislation to give it effect.

> "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law."

Davis v. Burke, 179 U. S. 399, 403 (21 SC 210, 45 LE 249) (1900), quoting Cooley, Constitutional Limitations. The constitutional amendment at issue here is not self-executing because it "merely indicates a line of policy or principle without supplying the means by which such policy or principle are to be carried into effect," and because "it appears from the language . . . that subsequent legislation was contemplated to carry it into effect." 16 CJS 123, 126, Constitutional Law, § 46. The 1994 constitutional amendment "clearly anticipates" the enactment of legislation by the General Assembly or a local governing body to implement the principles set forth in the amendment. *Cox v. French,* 277 Ark. 134 (640 SW2d 786 (1982). See *J.W.A. v. State of Ga.,* 233 Ga. 683 (212 SE2d 849) (1975). Because implementation of the constitutional amendment requires legislative enactment, the constitutional amendment is not effective until the legislation is passed. *State v. Pendergrass,* 633 P2d 1113 (Hawaii 1981). See also *DeKalb County v. Allstate Beer,* 229 Ga. 483 (2) (192 SE2d 342) (1972). Consequently, while the wording of the constitutional amendment authorizes enactment of local legislation that would be condemned as overbroad, it is the

language of the enacted local legislation, not the constitutional amendment, which must be examined for overbreadth. That being so, we decline to declare the constitutional amendment unconstitutionally overbroad.

2. (a) Appellant Varsalona asserts that the 1994 constitutional amendment violates the Georgia constitutional provision prohibiting the presentation to voters of a proposed constitutional amendment containing more than one subject matter. 1983 Ga. Const., Art. X, Sec. I, Par. II.

"The test of whether . . . a constitutional amendment violates the multiple subject matter rule is whether all of the parts of . . . the constitutional amendment are germane to the accomplishment of a single objective. [Cit.]" *Carter v. Burson*, 230 Ga. 511 (3) (198 SE2d 151) (1973). See also *Sears v. State*, 232 Ga. 547 (5) (208 SE2d 93) (1974). It is apparent that the general purpose of the amendment is the regulation of alcoholic beverages. Because the portion of the amendment delegating to local governmental units the authority to regulate the exhibition of nudity in connection with the sale of alcoholic beverages is germane to the general subject of the regulation of alcoholic beverages, the amendment does not violate the prohibition against multiple subject matters.

(b) Varsalona also contends that the wording of the ballot[3] concerning the constitutional amendment

---

[3] The ballot read as follows:

Shall the Constitution of the State of Georgia be amended so that alcoholic beverages and activities involving nudity and alcoholic beverages, such as in nude dance clubs, may be regulated, restricted, or prohibited by counties and

deceived the voters of Georgia, resulting in a violation of the due process guarantees of the Fourteenth Amendment to the U. S. Constitution. We disagree.

"[T]his court . . . [conducts] only a minimal review of ballot language if the State followed all of the constitutionally and statutorily required procedures for amending the constitution. . . ." *Donaldson v. Dept. of Transp.*, 262 Ga. 49, 51 (414 SE2d 638) (1992). There is no contention in the case at bar that the prescribed amendment procedure was not followed. "The only limitation on the General Assembly in drafting ballot language is that the language be adequate to enable the voters to ascertain which amendment they are voting on. [Cit.]." Id. See also *Burton v. Georgia*, 953 F2d 1266, 1269 (11th Cir. 1992) ("As long as citizens are afforded reasonable opportunity to examine the full text of the proposed amendment, . . . substantive due process requires no more than that the voter not be deceived [by the ballot language] about what amendment is at issue.") We conclude that the language used on the ballot is not susceptible to appellant's attack for it clearly enabled the voters to ascertain what amendment they were voting on.

3. Since the constitutional amendment which authorized the passage of the 1995 amendment to Marietta's ordinance has withstood Boomer's constitutional attack, we next focus our attention on the analytical approach to be taken with regard to the amended ordinance in light of

---

municipalities and so that the state shall have full and complete authority to regulate alcoholic beverages under the powers granted by the Twenty-First Amendment to the United States Constitution?

the passage of the constitutional amendment. In *Harris v. Entertainment Systems*, 259 Ga. 701 (1) (b), supra, this Court concluded that the State's exercise of its police power, as far as nude dancing is concerned, was limited by Georgia's constitutional guaranty of free expression, and scrutinized the statute which impinged upon protected expression under the state constitution's free speech clause, Art. I, Sec. I, Par. V. See *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252 (297 SE2d 250) (1982). The Court took that approach after conceding the possibility that passage of the Twenty-first Amendment to the federal constitution restored to the State police power otherwise limited by the First Amendment, but noting that the freedom of expression protected by the state constitution had not been similarly limited by ratification of a state constitutional amendment equivalent to the Twenty-first Amendment.[4] Id. See also *Chambers v. Peach County*, 266

---

[4] Georgia is not alone in using its state constitutional guaranty of freedom of expression, unburdened by a "mini-Twenty-first Amendment," to find unconstitutional a statute or ordinance proscribing nude dancing in establishments with liquor licenses. See *Mickens v. City of Kodiak*, 640 P2d 818 (Alaska 1982); *Bellanca v. N.Y. State Liquor Auth.*, 429 NE2d 765 445 NYS2d 87 (1981); *Commonwealth v. Sees*, 373 NE2d 1151 (Mass. 1978); *Cleveland's P.M. on the Boardwalk v. Ohio Liquor Control Comm.*, 1997 Ohio App. LEXIS 231 (Jan. 23, 1997); *Sekne v. City of Portland*, 726 P2d 959 (Or. App. 1986). Cf. *Knudtson v. City of Coates*, 519 NW2d 166 (Minn. 1994) (where the Minnesota Supreme Court, after noting that the Minnesota Constitution did not contain a provision equivalent to the Twenty-first Amendment, found the ordinance in question did not violate the state constitution's free speech guaranty because it was a reasonable exercise of police power only incidentally controlling free speech); *City of Billings v. Laedeke*, 805 P2d 1348

Ga. 318 n. 2 (467 SE2d 519) (1996); *Pel Asso, Inc. v. Joseph*, supra, 262 Ga. 904, 905 n. 1; *Gravely v. Bacon*, 263 Ga. 203, 208 (429 SE2d 663) (1993) (Hunt, P.J., concurring). But see *Illusions on Peachtree Street v. Young*, 257 Ga. 142 (3) (356 SE2d 510) (1987), where this court, faced with a First Amendment challenge to a city ordinance, relied on the broad power to regulate alcohol it said had been given local governments by the Twenty-first Amendment; and *Jackson v. Three Aces Co.*, 249 Ga. 395, 396 (291 SE2d 522) (1982), where this court stated that the Twenty-first Amendment vested state and local governments with "broad, sweeping authority to refuse to license the sale of liquor in establishments in which even non-obscene naked dancing is performed. [Cit.]"

Believing the passage of the 1994 constitutional amendment to have provided the Georgia Constitution with its equivalent of the Twenty-first Amendment to the U. S. Constitution[5] and relying on U. S. Supreme Court case law, the trial court concluded that Marietta's amended ordinance should be analyzed under the principles of the Twenty-first Amendment rather than the First

---

(Mont. 1991) (where the Montana Supreme Court noted the absence from its state constitution of a Twenty-first Amendment equivalent and then determined that Montana's free speech guaranty was co-extensive with the First Amendment).

[5] The Twenty-first Amendment to the U. S. Constitution did two things: it repealed the Eighteenth Amendment which totally prohibited the manufacture, sale, or transportation of intoxicating liquors within the United States and its territories, and it "delegated to the several States the power to prohibit commerce in, or the use of, alcoholic beverages." *44 Liquormart v. Rhode Island*, 517 U. S. ___ (116 SC 1495, 134 LE2d 711) (1996).

Amendment. Faced, however, with a dearth of Georgia case law examining a local ordinance enacted after the 1994 constitutional amendment, the trial court relied on pre-amendment case law and applied Georgia's free expression analysis, the *Paramount Pictures* test, to the amended ordinance. See *Paramount Pictures v. Busbee*, supra, 250 Ga. 252. We conclude that, under recent case law from the U. S. Supreme Court, the trial court was in error when it determined that passage of the 1994 constitutional amendment required analysis of the Marietta ordinance under the Twenty-first Amendment. However, as will be seen, the trial court's use of the applicable *Paramount Pictures* test rendered the error harmless.

It is easy to see why the trial court believed that freedom of expression had been supplanted by the authority delegated to the States by the Twenty-first Amendment and by the authority delegated by the State of Georgia to local governments in the 1994 constitutional amendment. In *California v. LaRue*, 409 U. S. 109, 118 (93 SC 390, 34 LE2d 342) (1972), the U. S. Supreme Court concluded an opinion in which it held that California's regulations prohibiting certain sexual performances and the dispensation of liquor were not violative of the First Amendment by stating that, "[g]iven the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires," it could not hold the state regulations facially invalid under the U. S. Constitution. In *Doran v. Salem Inn*, 422 U. S. 922, 932-933 (95 SC 2561, 45 LE2d 648) (1975), the Court, summarizing its *LaRue* construction of the Twenty-first Amendment, stated that "the broad powers of the States

to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program." See also *City of Newport v. Iacobucci*, 479 U. S. 92, 95 (107 SC 383, 93 LE2d 334) (1986). In *N.Y. State Liquor Auth. v. Bellanca*, 452 U. S. 714, 717 (101 SC 2599, 69 LE2d 357) (1981), the Court held that the State's power under the Twenty-first Amendment to ban the sale of alcohol entirely "includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." Although the U. S. Supreme Court has repeatedly noted that the Twenty-first Amendment does not qualify individual rights protected by the Bill of Rights (*Craig v. Boren*, 429 U. S. 190 (97 SC 451, 50 LE2d 397) (1976)) or override any other relevant constitutional provision (*California v. LaRue*, supra, 409 U. S. at 120) (Stewart, J., concurring), the Court's statements in *LaRue*, *Doran*, *Bellanca*, and *Iacobucci* became the basis for rulings by state appellate courts which upheld a statute or ordinance banning non-obscene nude dancing in a location with a liquor license.[6] See *State v. Larson*, 653 S2d 1158 (La. 1995); *Proctor v. County of Penobscot*, 651 A2d 355 (Me. 1994); *City of Billings v. Laedeke*, 805 P2d 1348 (Mont. 1991); *Misleh v. State*, 799 P2d 631 (Okla. Cr. App. 1990); *State of Idaho v. Pierandozzi*, 784 P2d 331 (Idaho 1989); *Morris v. Municipal*

---

[6] An entertainment program may not be prohibited solely because it contains nudity. *Schad v. Borough of Mt. Ephraim*, 452 U. S. 61, 67 (101 SC 2176, 68 LE2d 671) (1981). The "customary 'barroom' type of nude dancing" may involve expression minimally protected by the First Amendment. *Doran v. Salem Inn*, supra, 422 U. S. at 932.

Court, 652 P2d 51 (Cal. 1982); *Nall v. Baca*, 626 P2d 1280) (N.M. 1980); *Barmat v. Robertson*, 611 P2d 101 (Ariz. App. 1980). As was noted earlier, this court also saw the power of the Twenty-first Amendment as a means by which expression might be controlled. See *Illusions*, supra, 257 Ga. 142; *Three Aces Co.*, supra, 249 Ga. 395.

This long-used rationale has been called into question by the Supreme Court's recent disavowal of the reasoning in *LaRue* "insofar as it relied on the Twenty-first Amendment." *44 Liquormart v. Rhode Island*, 517 U. S. ___ (116 SC 1495, 134 LE2d 711) (1996). In *44 Liquormart*, the Supreme Court explained that the Twenty-first Amendment "limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its border, [but] . . . 'does not license the States to ignore their obligations under other provisions of the Constitution.' [Cit.]." Id., 116 SC at 1514. The Court noted that each State has ample power "[e]ntirely apart from the Twenty-first Amendment," i.e., the police power, to prohibit the sale of alcoholic beverages in inappropriate locations, and that the *LaRue* decision would have reached the same result had the Court relied exclusively on the State's exercise of its police power instead of buttressing it with the regulatory authority provided by the Twenty-first Amendment. In conclusion, the Supreme Court expressly held that "the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." Thus, "the suggestion in [*LaRue*, *Doran*, *Bellanca*, and *Iacobucci*] that the Twenty-first Amendment was a font of some sort of 'super authority' above and beyond the

considerable police powers retained by the States and which trumped the First Amendment when liquor regulation was at issue was clearly rejected in *44 Liquormart." J & B Social Club #1 v. City of Mobile,* 1996 U. S. Dist. LEXIS 15498 Oct. 2, 1996) (S. D. Ala.).

It is now clear that Georgia's ratification of a "mini-Twenty-first Amendment" to the state constitution provided the means by which the State delegated to local government its authority to regulate alcohol[7], but its passage does not affect the analysis to be given a statute or ordinance which allegedly impinges upon the constitutionally-guaranteed right of free speech and expression. Thus, application of our tripartite *Paramount Pictures* test or the First Amendment analytical framework from which it is derived remains appropriate for content-neutral legislation.[8]

---

[7] The States may delegate the broad power given them by the Twenty-first Amendment "as they see fit." *City of Newport v. Iacobucci,* supra, 479 U. S. at 96. A State's failure to delegate its Twenty-first Amendment authority to local governments within the State has resulted in a local ordinance being found unconstitutional. See *Connor v. Town of Hilton Head Island,* 442 SE2d 608 (S.C. 1994). Cf. *Krueger v. City of Pensacola,* 759 F2d 851, 854 (11th Cir. 1985), where the 11th U. S. Circuit Court of Appeals held that Florida's failure to delegate its Twenty-First Amendment regulatory authority to local governments required the city to justify its ordinance under "[a] stricter standard typically used to review an infringement on a protected liberty interest justified solely under the government's police power."

[8] The *Paramount Pictures* three-pronged study of statutes and ordinances to determine whether the free expression guaranty of the Georgia Constitution has been violated is derived from the analytical framework applied by federal courts when measuring legislative enactments against the First

4. Marietta's ordinance amendment is "content-neutral" legislation if it is "justified without reference to the content of the regulated speech. [Cit.]" *Chambers v. Peach County*, supra, 266 Ga. at 319. When adult entertainment establishments are involved, the "regulated speech" is the constitutionally-protected expressive conduct of nude dancing. *Harris v. Entertainment Systems*, supra, 259 Ga. 701. The principal inquiry in determining whether a legislative act is content-neutral is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys. [Cit.] The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. [Cit]." *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (109 SC 2746, 105 LE2d 661) (1989).[9] An ordinance designed to

---

Amendment of the U. S. Constitution. *Paramount Pictures*, supra, 250 Ga. at 255, n. 5.

[9] As *Ward* makes clear, determining whether legislation is content-neutral depends upon the governing body's purpose in passing the legislation. Accordingly, the *content* of the legislation, i.e., the regulation of adult entertainment establishments, does not control whether the legislation is content-neutral. This court's statement in *Club Southern Burlesque v. City of Carrollton*, 265 Ga. 528 (1) (457 SE2d 816) (1995), rejecting the club's contention that the ordinance regulating adult entertainment establishments was not content-neutral, should not be read as a holding that *all* ordinances regulating adult entertainment establishments are content-neutral. As noted in *Club Southern*, the *Paramount Pictures* standard of review is used only when the questioned legislation is found to be content-neutral, and the use of the *Paramount Pictures* test in two earlier cases reviewing ordinances nearly

combat the undesirable secondary effects of sexually explicit businesses is content-neutral. *City of Renton v. Playtime Theatres,* 475 U. S. 41, 49 (106 SC 925, 89 LE2d 29) (1986); *Chambers v. Peach County,* supra, 266 Ga. at 319. See also *Harris v. Entertainment Systems,* supra, 259 Ga. at 703. Before enacting an ordinance to combat undesirable secondary effects, a legislative body is required to consider specific evidence of the undesirable secondary effects that it reasonably believes relevant to the problems it seeks to address by passing the ordinance. *Chambers v. Peach County,* supra, 266 Ga. at 321.

The preamble to the amending ordinance passed by the Marietta City Council stated that the city council's enactment of the amendment was based on the experiences of other urban counties and municipalities believed to be relevant to Marietta's problems, and a review of a Marietta police report concerning criminal activity around the three existing clubs offering adult entertainment and alcohol. The preamble also contained the city council's finding that "public nudity (either partial or total) under certain circumstances, particularly circumstances related to the sale and consumption of alcoholic beverages and so-called nude bars or establishments offering so-called nude entertainment or adult entertainment begets criminal activity and tends to create undesirable community conditions." The preamble listed as "undesirable community conditions identified with nudity and alcohol" the depression of property values in

---

identical to the ordinance being reviewed in *Club Southern* led to the conclusion that the *Club Southern* ordinance was also content-neutral.

the surrounding neighborhood, the increased expenditure for law enforcement, the increased burden on the judicial system due to increased criminal behavior, and acceleration of community blight caused by the concentration of such establishments in particular areas. The transcript of the city council meeting at which the ordinance amendment was discussed and passed reflects that citizens and elected representatives voiced concern about property values and the need to close nude dancing establishments. The transcript also shows that council members considered studies from other cities which showed a correlation between the presence of adult entertainment and an increase in crime. The city's chief of police appeared at the council meeting and stated that the rate of calls for police service was slightly higher in the area surrounding the three licensees than at other establishments serving alcohol. He acknowledged that his statistics reflected calls for police service made from the areas studied, and that each call did not reflect the commission of a crime. In affidavits executed after the lawsuits at bar were filed, each of the council members who voted in favor of the ordinance amendment swore that he/she relied upon the testimony and evidence presented at the city council meeting at which the ordinance amendment was passed, including the studies from other cities. Each council member averred that the studies were "relevant to the City of Marietta, the problems faced by the City of Marietta and the problems addressed by the Ordinance."

Appellants Tudor and Cyprus Lounge assert that the trial court's finding, implicit in its application of the *Paramount Pictures* test, that the ordinance was content-neutral was erroneous in light of evidence that the mayor

and several council members expressed a desire in published reports to eliminate nude dancing establishments from Marietta. " '[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute' on the ground that 'a punitive purpose in fact lay behind the statute.' " *Ambassador Books & Video v. Little Rock,* 20 F3d 858, 863 (8th Cir. 1994), quoting *Fleming v. Nestor,* 363 U. S. 603, 617 (80 SC 1367, 4 LE2d 1435) (1960). Judicial inquiry into legislative motives or purposes is a "hazardous matter," for what motivates one legislator to make a comment about a law is not necessarily what motivates fellow legislators to enact the law. *United States v. O'Brien,* 391 U. S. 367, 383 (88 SC 1673, 20 LE2d 672) (1968). If it is established that the "predominate intent" of the enacted legislation was to combat or avoid pernicious secondary effects, then the legislation is deemed to be content-neutral. See *City of Renton v. Playtime Theatres,* supra, 475 U. S. at 48. With these standards in mind, we conclude that the evidence upon which appellants rely is insufficient as a matter of law to establish improper intent. *Ambassador Books & Video v. Little Rock,* supra, 20 F3d 858; *Colacurcio v. City of Kent,* 1996 U. S. Dist. LEXIS 16514 (W.D. Wash.) (Nov. 1, 1996). In light of the city council's predominate goal of combatting pernicious secondary effects and the lack of sufficient evidence to establish an improper motive on the part of council members, we conclude the ordinance is content-neutral.

5. Since the ordinance amendment was content-neutral, we apply the tripartite *Paramount Pictures* test to determine whether the restriction imposed on expression

passes constitutional muster: (1) Does the ordinance further an important governmental interest? (2) Is that interest unrelated to the suppression of speech? and (3) Is the legislation an incidental restriction of speech no greater than essential to further the important governmental interest? *Chambers v. Peach County*, supra, 266 Ga. at 319. As noted above, the stated purpose of the ordinance amendment was to control criminal behavior and prevent undesirable community conditions. A city has a substantial government interest in "attempting to preserve the quality of urban life. . . . " *City of Renton v. Playtime Theatres*, supra, 475 U. S. at 50. The "reduction of criminal activity and prevention of the deterioration of neighborhoods are important government interests. . . . " *Discotheque v. City Council of Augusta*, 264 Ga. 623, 624 (449 SE2d 608) (1994). The city substantiated its declaration that the amended ordinance was necessary to curb the unwanted secondary effects of mixing alcohol and adult entertainment through the experiences of other cities that the council members reasonably believed to be relevant to the problems faced by Marietta. The city's desire to preserve the quality of urban life and its attempt to reduce crime and prevent neighborhood deterioration by separating alcohol from adult entertainment are important government interests unrelated to the suppression of speech. Id. Finally, the ordinance's application is sufficiently narrowly tailored because it is limited to the modes of expression implicated in the production of negative secondary effects – those establishments that provide alcohol and entertainment requiring an adult entertainment license – thereby exempting mainstream performance houses, museums, or theaters. See *S.J.T., Inc.*

v. Richmond County, 263 Ga. 267 (3) (430 SE2d 726) (1993). Compare *Pel Asso, Inc. v. Joseph*, supra, 262 Ga. 904. We conclude that the ordinance satisfies the three-pronged *Paramount Pictures* test and affirm the trial court's conclusion that the ordinance is a proper exercise of the city's police power.

6. In light of the amended Marietta ordinance, none of the appellants received the appropriate licensing in 1996 to permit them to provide adult entertainment and alcohol at the same location.[10] Appellants contend they have a vested property right in the renewal of their adult entertainment and alcohol licenses which entitles them to due process of law and which prevents the city from enacting retrospective laws which adversely affect their ability to provide both liquor and adult entertainment. Under both the federal and state constitutions, one may not be deprived of life, liberty, or property by the government "without due process of law." U. S. Constitution, Amendment XIV; 1983 Ga. Const. Art. I, Sec. I, Par. I. The Georgia Constitution further prohibits the passage of retroactive laws (Art. I, Sec. I, Par. X), i.e., "laws which injuriously affect the vested rights of citizens." *Recycle &*

---

[10] As set forth in fn. 2, the businesses continue to operate by means of an agreement among the parties. Consequently, appellants have not yet been denied a license under the amended ordinance since they have not applied for licenses after the effective date of the amended ordinance. We nonetheless address the issue because it is clear that, but for the parties' agreement, appellants would have applied for and would have been denied alcohol licenses, based on the amended ordinance, if they wished to continue operating as they have in the past.

Recover v. Ga. Bd. of Nat. Resources, 266 Ga. 253 (2) (466 SE2d 197) (1996).

Due process requires that any licensing scheme enacted pursuant to the police power "provide sufficient objective criteria to control the discretion of the governing authority and adequate notice to applicants of the criteria for issuance of a license." *Levendis v. Cobb County,* 242 Ga. 592 (1) (250 SE2d 460) (1978). Due process also requires that one to whom a license is denied, or one whose valid license is being revoked or suspended, be given notice and an opportunity to be heard. See *Rose v. Grow,* 210 Ga. 664 (3) (82 SE2d 222) (1954); *Levendis v. Cobb County,* supra, 242 Ga. 592. See also OCGA §§ 3-2-3 (1) and 3-3-2 (a), and Marietta City Code §§ 8-20-160; 8-20-200 et seq. Both the adult entertainment occupation tax certificate (i.e., the adult entertainment license) and liquor license issued to each appellant expire annually on the last day of the year, and a license holder "renews" the licenses by filing an application for a license each year. Marietta City Code, § 170. Thus, the statutory scheme puts each appellant in the position of an applicant on an annual basis. Since both state law and Marietta's ordinance provide an applicant with notice and an opportunity to be heard concerning the denial of an application, appellants will be afforded due process should their applications be denied.

7. In order to address appellants' contention that the 1995 amendment to Marietta's ordinance is an unconstitutional retrospective law, we must determine whether appellants have a vested property right in the renewal of their licenses because "[o]ur Constitution forbids passage of retroactive laws which injuriously affect the *vested*

rights of citizens. [Cits.]" (emphasis added). *Recycle & Recover,* supra, 266 Ga. at 254. See also *Bullard v. Holman,* 184 Ga. 788, 792 (193 SE 586) (1937) ("a State constitution broadly prohibiting the passage of retroactive laws is to be restricted as to apply only to enactments affecting or impairing vested rights."). Generally, laws enacted pursuant to the police power for the public's protection may be modified without violating a constitutional prohibition against retrospective statutes. *Hayes v. Howell,* 251 Ga. 580 (2) (b) (308 SE2d 170) (1983). However, even modifications to police power enactments cannot impinge upon vested rights. *Recycle & Recover,* supra, 266 Ga. at 254.

> "To be vested, in its accurate legal sense, a right must be complete and consummated, and one of which the person to whom it belongs cannot be divested without his consent. A divestible right is never, in a strict sense, a vested right." [Cit.]. It has also been said that: "the term 'vested rights,' which cannot be interfered with by retrospective laws, means interests which it is proper for the State to recognize and protect and of which the individual cannot be deprived arbitrarily without justice." [Cits.]

Hayes v. Howell, supra, 251 Ga. 580, 584. A property interest protected by the due process clauses of the federal and state constitutions meets our definition of "vested rights." Accordingly, if appellants have a property interest in the renewal of their licenses that is protected by due process, then they have a vested right which cannot be affected adversely by a retrospective law. However, before there can be a property interest in the *renewal* of a license, there must be a property interest in the license itself. Accordingly, we examine the issue of

whether appellants have a protectable property interest in their licenses.

8. In the past, the contention that one had a property right in a liquor license was summarily dismissed as without merit in light of the legislative declaration contained in OCGA § 3-3-1 that "[t]he businesses of . . . selling, handling, and otherwise dealing in or possessing alcoholic beverages are declared to be privileges in this state and not rights." See, e.g., *City of Mountain View v. Clayton County*, 242 Ga. 163 (249 SE2d 541) (1978); *Massell v. Leathers*, 229 Ga. 503 (192 SE2d 379) (1972); *Highnote v. Jones*, 198 Ga. 56 (31 SE2d 13) (1944). However, the "right/privilege" dichotomy is no longer availing since "relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' " *Bell v. Burson*, 402 U. S. 535, 539 (91 SC 1586, 29 LE2d 90) (1971). See also *City of Atlanta v. Hill*, 238 Ga. 413, 414 (233 SE2d 193) (1977), where this court noted that "the death knell has been sounded to the right-privilege distinction."

Now, "[t]o have a property interest . . . , a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents v. Roth*, 408 U. S. 564, 577 (92 SC 2701, 33 LE2d 548) (1972). The Court in *Roth* pointed out that property interests do not spring forth from the U. S. Constitution, but are created and defined by statutes, rules, or understandings "that secure certain benefits and that support claims of entitlement to those benefits." Id., at 577. A license which entitles the holder to operate a business and the continued possession of which "may

become essential in the pursuit of a livelihood" is a protectable property interest under the Due Process Clause. *Bell v. Burson*, supra, 402 U. S. at 539. A law which provides that a license can be suspended or revoked only upon proof of certain contingencies "has engendered a clear expectation of continued enjoyment of [the] license absent proof of culpable conduct" and has thereby given the license holder a "legitimate 'claim of entitlement.' [Cit.]" *Barry v. Barchi*, 443 U. S. 55, 64, n. 11 (99 SC 2642, 61 LE2d 365) (1979). See also *Leone v. Town of New Shoreham*, 534 A2d 871 (R.I. 1987), where the Supreme Court of Rhode Island held that a license granted by government represented a property interest. Marietta's ordinance contains a list of grounds for the denial of an application for a liquor license (Marietta City Code § 8-8-2-130) and provides that a granted license is subject to revocation or suspension only upon the occurrence of specified events: conviction of a violation of the city code's liquor licensing provisions or any state or federal law, or revocation by the State of the license it issued for the manufacture or sale of alcoholic beverages. Marietta City Code § 8-8-2-220 (B) and (C). Since Marietta's city code sets forth the criteria which, if met, result in the issuance of a license, and specifies that a liquor license issued by the city can be suspended or revoked only upon a showing of cause, the city code created a protectable property interest in the license. *Barry v. Barchi*, supra, 443 U. S. at 64; *Richardson v. Town of Eastover*, 922 F2d 1152, 1156 (4th Cir. 1991). See also *Harris v. Entertainment Systems*, supra, 259 Ga. at 704, where this court, while expressly declining to determine the nature of the licensee's property interest, concluded that the licensee had a sufficient property

interest in the license to permit a court of equity to enjoin a criminal prosecution.[11]

9. Having determined that appellants have a vested right in the licenses issued them on an annual basis, we next consider whether each appellant has a vested right in continued re-issuance of its licenses. The same principle is applicable: the licensees must have more than a unilateral expectation that their licenses will be renewed year after year – they must have a legitimate claim of entitlement to license renewal (*Bd. of Regents v. Roth*, supra, 408 U. S. at 577) "based upon a state law, regulation, policy, or a mutually explicit understanding a governmental body puts forth. . . . " *Resolution Trust Corp. v. Town of Highland Beach*, 18 F3d 1536, 1544 (11th Cir. 1994). As stated earlier, state and local law expressly provide that issued liquor licenses expire at the end of the year and a licensee must apply annually to keep a license active. OCGA § 3-2-7; Marietta City Code § 8-2-2-200 (A). Adult entertainment occupation tax certificates issued by Marietta also have a lifespan of one year. City Code § 8-20-170. Faced with ordinances which expressly limit the duration of a license issued by Marietta, appellants assert they have a vested right to continue to offer adult entertainment and alcohol based on Marietta's past practice of annually issuing licenses to them.

---

[11] In *Harris v. Entertainment Systems*, supra, 259 Ga. 701 (2), this court expressly noted that it made "no determination as to the nature of the property interest, only that it is sufficient to meet the [equity] exception set out in *Moultrie* [*Milk Shed v. City of Cairo*], 206 Ga. 348 [(1) (57 SE2d 199) (1950)]."

By relying on the City's practice of renewing licenses, appellants are contending that they and the city have "a mutually explicit understanding" that the City will allow appellants to continue to operate "as is." See *Perry v. Sindermann, supra,* 408 U.S. 593. While Marietta has, for several years, issued licenses which annually authorized appellants to offer both alcohol and adult entertainment for the calendar year covered by the licenses (see Footnote 1, supra), those licenses were of finite duration, and the city code expressly stated that the applicant for a liquor or an adult entertainment license had to meet annually the requirements for issuance set forth in the respective city code chapters. City Code §§ 8-8-2-130 (A) (10); 8-20-170. Compare *Cabo Distrib. Co. v. Brady,* 821 FSupp. 582, 597 (N. D. Cal. 1992), where the "certificate of label approval" was issued for "a potentially unlimited period of time. . . . " The annual issuance of the licenses could not create "a mutually explicit understanding" that licenses would annually be issued to appellants indefinitely, for nowhere does the city code provide that the licensing requirements will remain static. See *Triple A Svcs. v. Rice,* 545 NE2d 706 (Ill. 1989), where the Supreme Court of Illinois held that long and continued operation of their businesses did not vest mobile food vendors licensed by the City of Chicago with a property interest in the continuation of their business. See also *Ficarra v. Dept. of Regulatory Agencies,* 849 P2d 6 (Colo. 1993), where the Supreme Court of Colorado noted that one who holds a license that expires annually assumes the risk it may not be renewed. Compare City Code § 8-8-2-240 (A), which exempts the holder of a Marietta liquor license from

certain licensing requirements (residency, distance, location, parking, and type of building structure) so long as the licensee continues to remain in compliance with those requirements as they existed at the time the licensee initially received the liquor license.

> In organized society, every [person] holds all he possesses, and looks forward to all he hopes for, through the aid and under the protection of the laws; but as changes of circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well-founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense.

Cooley, Constitutional Limitations, pp. 746-747 (Vol. 2) (8th ed. 1927). The City Code makes it clear that the Marietta licensees before us do not have a vested right in the law never changing, and are not exempt from the exercise of the city's police power by its elected officials to further an important governmental interest. In light of the above, "the substantial reliance placed by [appellants] upon the renewal of their licenses, by constitutional standards, amounts only to 'a unilateral expectation,' *Roth*, [supra], 408 U. S. at 577 . . . " of renewal. *Ficarra v. Dept. of*

Regulatory Agencies, supra, 849 P2d at 20. Because appellants did not have a legitimate claim of entitlement to continued re-issuance of their annual licenses, they did not have a protectable property interest in their renewal. Compare *Bundo v. Walled Lake,* 238 NW2d 154 (Mich. 1976), and *Bosselman, Inc. v. State of Nebraska,* 432 NW2d 226) (Neb. 1988), where the Michigan and Nebraska supreme courts ruled that a licensee had a constitutionally-protected interest in obtaining a renewal of a liquor license.

10. Relying on *Clairmont Dev. Co. v. Morgan,* 222 Ga. 255 (149 SE2d 489) (1966), appellants claim they acquired vested rights to the continued re-issuance of alcohol and adult entertainment licenses for the same location because each of them spent substantial sums of money in reliance upon the initial issuance of the licenses. It is a tenet of zoning law that a property owner may acquire a vested right under a zoning ordinance which precludes retroactive application of zoning ordinances:

> "A landowner will be held to have acquired a vested right to continue the construction of a building or structure and to initiate and continue a use despite a restriction contained in an ordinance where, prior to the effective date of the ordinance, in reliance upon a permit theretofore validly issued, he has, in good faith, made a substantial change of position in relation to the land, made substantial expenditures, or has incurred substantial obligations." 3 Rathkopf, Law of Zoning and Planning, § 57-3. . . .

Barker v. County of Forsyth, 248 Ga. 73, 75-76 (281 SE2d 549) (1981). While we have acknowledged the existence of "constitutionally protected vested zoning rights" of a

property owner, under certain conditions, so as to preclude retroactive application of a *zoning* ordinance (e.g., *Corey Outdoor Advertising v. Bd. of Zoning Adjustments,* 254 Ga. 221 (4) (327 SE2d 178) (1985)), the same is not applicable to *licenses* to conduct a business. In *Cobb County v. Peavy,* 248 Ga. 870 (1a) (286 SE2d 732) (1982), this court distinguished between a business license and a building permit, holding that issuance of the latter, "a device for ensuring compliance with zoning ordinances" created a vested right in existing zoning ordinances, but that procurement of a business license, "typically not a device for ensuring compliance with zoning ordinances[,]" did not bestow vested rights upon the holder. We continue to adhere to the distinction and conclude that appellants' expenditure of funds in reliance upon the city's annual issuance of liquor and adult entertainment licenses to them did not endow them with a vested right to remain in business under the licensing regulations in existence at the time appellants received their initial licensing. Those who hold licenses that expire annually act at their peril and assume the risk that their licenses might not be renewed notwithstanding they have "committed their lives and their capital to building their businesses" which need licenses to operate. *Ficarra v. Dept. of Regulatory Agencies,* supra, 849 P2d at 18. Appellants must meet the requirements of the ordinance in effect at the time they file their annual applications for licenses. Cf. *Recycle & Recover,* supra, 266 Ga. at 255 (the filing of a "then-proper" application gives the applicant a vested right to issuance of the permit under the law as it existed at the time of the application).

11. Since appellants do not have a vested right to renewal of their licenses, their assertions concerning unconstitutional application of retrospective laws, unconstitutional impairment of contract, and an unconstitutional taking of property, all of which require the presence of a vested right/property interest, must fail.

12. The mayor and city council members are not individually liable as there is no evidence they acted oppressively, maliciously, corruptly or without authority of law so as to divest themselves of legislative immunity. OCGA §§ 36-66-4; 50-1-20.

13. In light of the above, appellant Cyprus Lounge is not entitled to a writ of mandamus requiring the City to issue to it adult entertainment and liquor licenses for the same location.

Judgment affirmed. All the Justices concur, except Sears, J., who dissents.

SEARS, Justice, dissenting.

In this appeal we are once again called upon to grapple with questions regarding the regulation of nude dancing. Although the majority implies in Division 10 that, because of the appellants' substantial expenditures in their businesses, they would have acquired vested rights if the City of Marietta had chosen to regulate adult entertainment by way of a zoning ordinance, the majority holds that the appellants acquired no right to continue their businesses since the city chose to regulate adult entertainment pursuant to a licensing scheme. I disagree with this holding and therefore dissent.

The majority relies largely on Division 1 (a) of *Cobb County v. Peavy*[12] for its holding. I find, however, that that division of *Peavy* is inapposite to this case. The contention addressed in Division 1 (a) of *Peavy* was whether the issuance of a business license in and of itself, without regard to the property owner's investment in the business, was sufficient to create a vested right. Here, of course, the issue is whether the appellants have acquired a vested right to operate their businesses because they obtained the appropriate licenses pursuant to the adult entertainment ordinance and because they made substantial expenditures to put the businesses into operation. Furthermore, although we held in *Peavy* the fact that the appellant had obtained a business license was not enough, by itself, to give her a vested right, we did not hold that this factor was dispositive of the appeal. Instead, we addressed whether Peavy had a vested right in her lawful, pre-existing use based upon the expenditures she had made.[13] *Peavy* thus implicitly stands for the proposition that a person operating a business can obtain a vested right based upon expenditures even if that person cannot acquire vested rights based upon the business license.

Moreover, I find no rational reason to treat *an adult entertainment ordinance like the one in this case* any differently from a zoning ordinance for purposes of determining vested rights. First, *Peavy* itself acknowledged that "the general aim of both zoning and licensing regulations is the promotion of the general welfare." Second, zoning

---

[12] 248 Ga. 870, 872 (1) (a) (286 SE2d 732) (1982).

[13] *Peavy*, 248 Ga. at 872.

regulations, like licensing regulations, are subject to change at any time if the local government believes that the change will promote the general welfare of the community. Third, the adult entertainment ordinance in this case is in fact a combination zoning-licensing scheme, containing numerous traditional zoning features. Finally, here, unlike many licensing regulations, including the one at issue in the Colorado case on which the majority relies,[14] the adult entertainment ordinance was amended so as to entirely preclude the businesses that the appellants had been operating – lounges featuring nude dancing.

Because the adult entertainment ordinance at issue is a combination zoning-licensing scheme, because the ordinance's amendment precludes a pre-existing use of the property, and because zoning and licensing schemes share a common goal of furthering the general welfare of the public, I would apply to this case the well-established principle that the termination of a pre-existing use of property that does not constitute a nuisance and has not been abandoned generally is confiscatory unless there is a reasonable amortization period in which to bring the use to a close.[15] Under that test, I believe that the trial court

---

[14] See *Ficarra v. Dept. of Regulatory Agencies*, 849 P2d 6 (Colo. 1993).

[15] 4 Ziegler, Rathkopf's The Law of Zoning and Planning, § 51.01[2][a] (4th ed.); 2 Ziegler at 17B.02 [3][I]; 4 Ziegler at 51B.05 [1]; *Ebel v. City of Corona*, 767 F2d 635, 639 (3) (9th Cir. 1985) (60-day amortization period for adult bookstore was found not to be satisfactory in view of length of lease and financial investment in bookstore).

erred in granting summary judgment to the appellees. I therefore dissent.

SUPREME COURT OF GEORGIA

Case No. S96A1496 Atlanta, April 03, 1997

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

VARSALONA'S ITALIAN RESTAURANT, INC., d/b/a BOOMER'S, et al. CITY OF MARIETTA et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Sears and Carley, JJ., dissent.

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

GOLD RUSH II, INC. and MUKESH SHRETTA, PLAINTIFFS, VS. CITY OF MARIETTA, GEORGIA, BETTY L. HUNTER, M.C. PETE WALDREP, JR., DANIEL O. COX, SR., E. PAUL SABISTON, JAMES C. DODD, AND FRANK T. AYERS, DEFENDANTS.	CIVIL ACTION FILE NO.: 9514269-33
VARSALONA'S ITALIAN RESTAURANT, INC., D/B/A BOOMER'S, A GEORGIA CORPORATION AND PATRICK VARSALONA, PLAINTIFFS, VS. THE CITY OF MARIETTA, GEORGIA, BETTY L. HUNTER, M.C. PETE WALDREP, JR., DANIEL O. COX, SR., E. PAUL SABISTON, JAMES C. DODD, AND FRANK T. AYERS, ALL IN THEIR INDIVIDUAL CAPACITY AS WELL AS CAPACITY AS	CIVIL ACTION FILE NO.: 95-1-5066-33

COUNCILPERSONS FOR THE CITY OF MARIETTA, AND PHILLIP GOLDSTEIN, IN HIS CAPACITY AS A COUNCILMAN ONLY, AND ANSLEY L. MEADERS, IN HER INDIVIDUAL CAPACITY AS WELL AS MAYOR OF THE CITY OF MARIETTA,

DEFENDANTS.

JAMES H. TUDOR, INDIVIDUALLY AND D/B/A CYPRUS LOUNGE,

PLAINTIFF,

V.

THE CITY OF MARIETTA, GEORGIA, BETTY L. HUNTER, M.C. PETE WALDREP, JR., DANIEL O. COX, SR., E. PAUL SABISTON, JAMES C. DOOD, AND FRANK T. AYERS, ALL IN THEIR INDIVIDUAL CAPACITY AS WELL AS CAPACITY AS COUNCILPERSONS FOR THE CITY OF MARIETTA, AND PHILLIP GOLDSTEIN, IN HIS CAPACITY AS A COUNCILMAN ONLY, AND ANSLEY L. MEADERS, IN HER INDIVIDUAL CAPACITY AS WELL AS MAYOR OF THE CITY OF MARIETTA,

DEFENDANTS.

CIVIL ACTION FILE NO.: 951710833

(Filed April 2, 1996)

ORDER

The above and foregoing matter came before the Court for a specially set hearing on the Defendants, Motion for Summary Judgment. After hearing extensive oral arguments and reviewing the record the Court finds as follows:

Procedural Background

On or about June 6, 1995, Gold Rush II, Inc. d/b/a Taj Mahal and Mukesh Shretta (hereinafter "Taj Mahal"), filed suit against the City of Marietta, Georgia, Betty L. Hunter, M.C. Pete Waldrep, Jr., Daniel O. Cox, Sr., E. Paul Sabiston, James C. Dodd, and Frank T. Ayers, Defendants (hereinafter collectively referred to as "Defendants", "City of Marietta", or "the City"). On or about July 6, 1995, Varsalona's Italian Restaurant Inc. d/b/a Boomer's and Patrick Varsalona (hereinafter "Boomer's"), filed suit against the Defendants, and on or about August 17, 1995, the Court consolidated the cases. Subsequently, on or about September 1, 1995, the Defendants filed their Motion for Summary Judgment.

Thereafter, on or about September 19, 1995, James H. Tudor, Individually and d/b/a Cyprus Lounge (hereinafter "Cyprus"), filed its suit against the Defendants, and agreed to consolidate same with the existing cases. Defendants filed an Amended Motion for Summary Judgment on or about October 20, 1995, and same was heard on December 8, 1995. All parties were represented at the specially set hearing and were given a period of ten hours to collectively present their cases. Following the hearing, on or about December 15, 1995, the parties entered into a

Consent Temporary Order whereby it was determined that the status quo would be maintained pending a resolution of the matters at issue from this Court and until the parties have exhausted all appeals through the Georgia Supreme Court level.

Factual Background and Legal History

On or about March 8, 1991, the City of Marietta enacted an ordinance dealing with adult entertainment specifically called Ordinance No. 4875. With respect to necessary licensing, the effect of the ordinance was that any establishment, the intention of which is to provide adult entertainment and serve alcohol, must obtain two seperate [sic] licenses for each purpose, both of which are required to be renewed on an annual basis.

According to the ordinance, any adult entertainment establishment must obtain an occupation tax certificate which "may be renewed on a calendar year basis provided that the applicants continue to meet the requirements set out in this chapter. The renewal fee for the adult entertainment establishments permit shall be established by resolution of the city council. Renewal applications shall be due by January 1st of the year for which such permit is requested." Marietta City Code 8-20-170.

Additionally, with respect to liquor licenses, the City's ordinance states in relevant part:

> (A) Duration and renewal of licenses under this chapter shall be as for business licenses generally; alcoholic beverage licenses renewals shall be due on or before November 15th of the year in which the license expires; and no

> licensee shall have any vested right to the renewal of any city license. . . . Marietta City Code 8-8-2-200.

On or about March 6, 1991, Boomer's opened for business, and maintained a liquor license and license for adult entertainment in accordance with the ordinance. On or about November 13, 1991, Cyprus applied for and obtained the necessary licenses to operate an adult entertainment establishment with the consumption of alcoholic beverages. In March of 1993, Taj Mahal applied for and obtained licenses to operate an adult entertainment establishment with the consumption of alcoholic beverages.

In 1994, the General Assembly proposed a constitutional amendment delegating the state's authority under the Twenty-First Amendment to municipalities and counties to regulate adult entertainment in connection with the sale of alcoholic beverages. The Constitutional Amendment, being Article III, Section VI, Paragraph VII, was placed on the ballot, and provides in pertinent part as follows:

> "Paragraph VII. **Regulation of alcoholic beverages.** The State of Georgia shall have full and complete authority to regulate alcoholic beverages and to regulate, restrict, or prohibit activities involving alcoholic beverages. This regulatory authority of the state shall include all such regulatory authority as is permitted to the states under the Twenty-First Amendment to the United States Constitution. This regulatory authority of the state is specifically delegated to the counties and municipalities of the state for

> the purpose of regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages; and such delegated regulatory authority may be exercised by the adoption and enforcement of regulatory ordinances by the counties and municipalities of this state. A general law exercising such regulatory authority shall control over conflicting provisions of any local ordinance but shall not preempt any local ordinance provisions not in direct conflict with general law."

The Georgia voters approved the Amendment on November 8, 1994.

On or about January 19, 1995, the City of Marietta adopted an amendment to its Adult Entertainment Ordinance which effectively bans alcohol in adult entertainment establishments (hereinafter "the ordinance"). The ordinance amends Section 8-5032 of the Marietta City Code, and reads in pertinent part as follows:

> "(a) [n]o person, association, partnership or corporation licensed under Chapter 5 of Part 8 (8-5001 et seq.) of the Marietta City Code after the effective date of this ordinance shall serve, sell, distribute or suffer the consumption or possession of any intoxicating liquor, beer or wine or controlled substance upon the premises of any licensee. Any licensee whose license was granted prior to the adoption of this amendment shall not be subject to this amendment until December 31, 1995, at which time all licensees within the City of Marietta shall be subject to this provision, including those licensees licensed before the effective date hereof.

> (b) This section (8-5032) shall not apply nor prohibit the live performance of legitimate plays, operas, ballets at mainstream theaters, concerts halls, museums or educational institutions holding a license, which derive less than twenty (20%) of its gross receipts from the sale of alcoholic beverages."

The Ordinance, No. 5399 also states as follows:

> "(b) This ordinance is also adopted pursuant to the authority granted by Article III, Section VI, Paragraph VII of the Constitution of the State of Georgia.
>
> (c) This ordinance is further adopted to protect the public safety, health and welfare."

The reference to "Article III, Section VI, Paragraph VII" is to the aforementioned Amendment to the Georgia Constitution which was ratified by the voters on November 8, 1994 and became effective January 1, 1995. In effect, the Amendment to the Georgia Constitution delegated the State of Georgia's authority under the Twenty-First Amendment to the U.S. Constitution to counties and municipalities, and the City of Marietta's ordinance is the result of that delegation of power.

The City of Marietta takes the position that the stated purpose of the Ordinance is to eliminate the adverse effects of the sale of alcohol in adult entertainment establishments, same being increased criminal activity and decreased property values. The City contends that it relied on various studies from other areas in adopting the ordinance, and the Court will more fully discuss said studies in the remainder of this order.

By its own terms the Ordinance allowed the existing adult entertainment establishments, same being the Plaintiffs in this action, to keep their current licenses for the 1995 year. The Plaintiffs were licensed in 1995 to serve alcoholic beverages and offer adult entertainment, and such licenses expired on December 31, 1995. Upon the expiration of the 1995 licenses, the ordinance allowed the Plaintiffs to keep either their adult entertainment license or their liquor license, but not both. That denial resulted in the Plaintiffs instituting the subject litigation.

The Plaintiffs have brought suit for declaratory and injunctive relief seeking to prohibit the enforcement of the City of Marietta Ordinance. Cyprus also seeks the issuance of a mandamus to require Defendants to issue 1996 adult entertainment and alcoholic beverage licenses; and, similarly, Taj Mahal has filed an Application for Temporary Restraining Order and Preliminary Injunction, seeking an order restraining the City's enforcement of the ordinance. Although a variety of approaches are taken, the underlying argument presented by the Plaintiffs is the constitutionality of the Georgia constitutional amendment and the subsequent enactment of the ordinance by the Defendants.

Conclusions of Law

The ordinance adopted by the City of Marietta is the result of the amendment to the Georgia Constitution, and thus the Court will begin its analysis at the State level. Cyprus and the Taj Mahal are not challenging the enactment of the Constitutional amendment, but Boomer's

takes the position that the regulation of alcoholic beverages by the Constitutional amendment failed in two areas in that (1) the Amendment violates the first Amendment of the United States Constitution and the Constitution of the State of Georgia because it is fatally over broad, and (2) the Amendment was not limited to a single subject matter as required by the Georgia Constitution, nor did the ballot fairly apprise the voters of the substance of the amendment as required by the United States Constitution.

The Court finds that the evidence submitted in support of Defendants' Motion for Summary Judgment clearly showed that the Amendment to the Georgia Constitution was properly ratified by the electors of the State of Georgia and complied with all aspects of Article X, Section I, Paragraph II of the Georgia Constitution and statutory laws governing amendments to the Georgia Constitution. As presented by the Defendants, the two vital elements in any constitutional amendment are the assent of two-thirds of the Legislature and a majority of the popular vote. *Mayer v. Adams,* 182 Ga. 524, 186 S.E. 420 (1936). Although the other elements such as publication and ballot language are important, they are not themselves the essentials. *Mayer,* at 530.

Boomer's did not allege that the Amendment was not approved by two-thirds of the Legislature nor did Boomer's allege that the Amendment was not approved by a majority of the voters. Notwithstanding, the evidence clearly established that these elements were satisfied. The Court's review of the Roll Call Votes taken by the Georgia Senate and House of Representatives indicates that the requite number of votes existed. See

Exhibits F, G, H of Defendants' Motion for Summary Judgment.

The test for determining whether a constitutional amendment violates the multiple subject matter rule is whether all of the parts of a constitutional amendment are germane to the accomplishment of a single objective. *Carter v. Burson*, 230 Ga. 511, 519, 198 S.E.2d 151 (1973). The Court finds that the Amendment's single subject matter was the regulation of alcoholic beverages in adult entertainment establishments. Furthermore, the language of the Amendment was sufficient to enable to [sic] voters to ascertain the subject on which they were voting. *See Sears v. State*, 232 Ga. 547, 208 S.E.2d 93 (1974). The record shows that the Amendment was duly published in the Marietta Daily Journal, same being the Cobb County Legal Organ, during the weeks of October 17, 24, and 31, 1994. This is the method by which the voters inform themselves of the contents and merits of the proposed amendment. *Sears*, at 555.

The Court agrees with the Defendants that the Plaintiffs, remaining claims alleging that the Amendment is over broad and does not address retroactivity are without merit. The United States Supreme Court has ruled that invalidation of an ordinance on overbreadth grounds should only be applied "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). The Court finds that the Amendment to the Georgia Constitution furthered a substantial governmental interest and that the incidental restrictions on First Amendment freedoms were no greater than essential to further that interest. Therefore, the Court rejects any arguments

as to the invalidity of the amendment to the Georgia Constitution.

The Defendants are correct that as the Georgia Constitution now has the equivalent to the Twenty-First Amendment, analysis under the Twenty-First Amendment rather than the First Amendment is appropriate. *See City of Newport v. Iacobucci*, 479 U.S. 92 (1986); *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981). *Compare Harris v. Entertainment Sys. Inc.*, 259 Ga. 701, 386 S.E.2d 140 (1989). The Twenty-First Amendment to the United States Constitution provides that "[t]he transportation or importation into any State. . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, §2. With respect to the Twenty [sic] First Amendment to the United States Constitution, the United States District Court of Georgia has stated that the State's broad power under the Twenty [sic] First Amendment to ban entirely the sale of alcoholic beverages, which may be delegated as the state sees fit, includes the lesser power to ban the sale of liquor on premises where topless dancing occurs despite possible First Amendment implications. *Top Shelf v. Mayor & Aiderman for Savannah*, 804 F.Supp. 903 (S.D. Ga. 1993).

Therefore, this Court must now determine the validity of the ordinance passed by the City of Marietta passed pursuant to the authority delegated by the amendment to the Georgia Constitution. Inasmuch as there have been no other ordinances passed by a local governing body subsequent to the passage of the constitutional amendment, the instant action presents a case for which there is no binding precedent. Thus, the Court will

look to decisions based on the law prior to the Constitutional amendment and those which specifically address the lack of such an amendment.

The test of the constitutionality of a local adult entertainment ordinance was established in the landmark case of *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 297 S.E.2d 250 (1982). The "*Paramount* test" states that an adult entertainment ordinance is deemed constitutional (1) if it furthers an important government interest; (2) if that government interest is unrelated to the suppression of speech; and (3) if the incidental restriction on speech is no greater than is essential to the furtherance of that government interest. *Paramount*, at 256. A carefully and narrowly drawn regulatory scheme which makes appropriate distinctions between public and private behavior and which impacts only those modes of expression which, in the experience of local governments, tend to be the focal points of negative effects such as increased crime, can pass constitutional muster notwithstanding some restriction of protested expression. *Gravely v Bacon*, 263 Ga. 203, 429 S.E.2d 663 (1993). In enacting an adult entertainment ordinance, a city may rely on evidence of pernicious secondary effects of adult entertainment establishments as found by studies commissioned by other municipalities and counties. *Club Southern Burlesque, Inc. v City of Carrollton*, 265 Ga. 528, 457 S.E.2d 816 (1995).

A critical factor in a trial court's decision in a case involving ordinances controlling adult entertainment and alcoholic beverages is the use of studies of adverse impacts considered by the governing body. In the case at bar Plaintiffs claim that there is insufficient evidence of pernicious secondary effects within the City of Marietta

and that the studies of other cities which the City considered are flawed.

The Defendants take the position that the ordinance was adopted after review and consideration by Defendants of specific evidence of the pernicious secondary effects of adult entertainment establishments licensed to sell alcohol for consumption on the premises. Specifically, the Defendants considered the studies of other cities which showed a correlation between adult entertainment and increased crime and lower property values. The Defendants reviewed the studies from six (6) other jurisdictions: Austin, Texas; Dallas, Texas; Houston, Texas; St. Paul, Minnesota; Minneapolis, Minnesota and Los Angeles, California.

Defendants also reviewed a 1991 Atlanta Business Chronicle article on the adult entertainment business in Atlanta, Georgia. In all, the Defendants contend that the total number of pages in said studies and other articles was 506 pages. The individual Defendants considered the evidence in the studies to be relevant to the City of Marietta, the problems faced by the City of Marietta and the problems addressed in the ordinance. See Affidavit of Frank T. Ayers, Affidavit of Paul Sabiston, Affidavit of Daniel (Dan) O. Cox, Sr., Affidavit of James C. Dodd, Jr., Affidavit of M.C. (Pete) Waldrep, Jr., and Affidavit of Betty Lou Hunter. After consideration of all the evidence, the Defendants voted six to one to pass the amendment to its Ordinance.

Notably, three of the studies reviewed by Defendants have been approved by the appellate courts. In *Parker v Whitfield County*, Case #S95A0655 (Georgia Supreme

Court, 11/6/95), the Court approved the Indianapolis study, and in *World Famous Dudley's Food and Spirits, Inc.*, 265 Ga. 618, 458 S.E.2d 823 (1995) the Court approved the Austin, Texas and Indianapolis study, and in *Centaur v Richland County, South Carolina*, 392 S.E.2d 165 (1990), the Supreme Court of South Carolina approved the Austin, Indianapolis and Los Angeles study. Also, in *Top Shelf*, supra, the District Court approved the Austin, Texas, Indianapolis and Los Angeles studies.

Defendants have filed with this Court the Affidavits of the Mayor and six (6) members of Council which state, among other things, that the Mayor and Members of Council were acting in good faith in the adoption of the Ordinance and were not acting oppressively, maliciously or corruptly. In addition, each Affidavit states that the Affiant relied upon the studies in the record and found that the studies were relevant to the problems faced by the City of Marietta. The Affidavits further state that the Mayor and Members of Council relied upon the advice of the City Attorney in adopting said Ordinance. See Affidavit of Frank T. Ayers, Affidavit of Paul Sabiston, Affidavit of Daniel (Dan) O. Cox, Sr., Affidavit of James C. Dodd, Jr., Affidavit of M.C. (Pete) Waldrep, Jr., and Affidavit of Betty Lou Hunter.

Plaintiffs filed a Motion to Strike the studies relied upon by Defendants claiming such are hearsay and not authenticated. However, the Georgia Supreme Court has determined that such studies are not hearsay because they do not rest on the veracity and competency of the studies themselves or their authors. Rather, the evidence derives its value solely from the credit of the City's representation that it had relied upon the named studies

and the relevance thereof. "The list of studies and the representation that those studies support the City's position were not offered to prove the truth of the matters asserted therein, but were offered to prove that the City had considered specific evidence of the pernicious secondary effects of adult entertainment establishments which it reasonably believed to be relevant to the problems addressed by the ordinance." *Club Southern,* at 530. It is not incumbent upon the City to prove the efficacy of the studies. To the contrary, the City is only required to prove that it considered specific evidence of the pernicious secondary effects of adult entertainment establishments which it reasonably believed to be relevant to the problems addressed by the ordinance. *Dudley's,* at 525, *Parker v Whitfield County,* supra.

In cases where an ordinance is ultimately struck down as being unconstitutional, the appellate courts have noted a failure by the governing body to consider studies. In a recent decision the Georgia Supreme Court turned its attention directly to the local government's effort to establish that its ordinance was passed to combat undesirable secondary effects of sexually explicit business. In *Chambers d/b/a "Neon Cowboy" v Peach County, Georgia,* Nos. S-95-A-1967 (3/4/96) the Supreme Court stated that in enacting an ordinance to combat the undesirable effects of adult entertainment establishments, a governing body is required to rely upon evidence reasonably believed to be relevant to the problem the government is addressing. *Chambers,* supra. The Court found that the Peach County ordinance's statement of purpose was not evidence of the undesirable secondary effects upon which the county could rely in enacting the ordinance and did

not show that, in enacting the ordinance, the county relied on evidence reasonably believed to be relevant to the problems of increased crime and neighborhood deterioration. "At the time a governing body seeks to regulate adult entertainment establishments, it must have evidence of a relationship between the proposed regulation and the undesirable secondary effects it seeks to control . . . In passing its regulation, a governing body may rely on the experience of other counties and municipalities to show the relationship." *Chambers*, supra.

Thus, although the City of Marietta's preamble to its ordinance states "[T]his ordinance is further adopted to protect the public safety, health and welfare. . . . " reliance on verbiage in an ordinance's preamble is not enough. Similarly, in an earlier case the Supreme Court of Georgia rejected as insufficient the City of Augusta' reliance on its preamble which stated the city had relied on the experience of other municipalities and counties as showing that criminal activity and deterioration of neighborhoods are secondary effects of adult entertainment establishments. *Discotheque v City Council of Augusta*, 264 Ga. 623, 449 S.E.2d 608 (1994). Therefore, it is clear that such a reliance will not carry the requisite burden to be met by a governing body in upholding the constitutionality of an ordinance regulating adult entertainment.

However, unlike the parties in *Discotheque* and *Chambers*, the City of Marietta did not rely solely on the statement in its preamble as to the purpose of the ordinance. The Defendants considered specific evidence of the pernicious secondary effects of adult entertainment establishments which it reasonably believed to be relevant to

the problems addressed by the ordinance. As stated previously, the Defendants relied upon the studies of the Cities of Austin, Texas; St. Paul, Minnesota; Minneapolis, Minnesota; Dallas, Texas; Houston, Texas; Los Angeles, California and an Article on Regulating Sex Businesses. The studies were distributed to members of Council for their review prior to the meeting and were read and considered by the members of Council. See Affidavit of Frank T. Ayers, Affidavit of Paul Sabiston, Affidavit of Daniel (Dan) O. Cox, Sr., Affidavit of James C. Dodd, Jr., Affidavit of M.C. (Pete) Waldrep, Jr., and Affidavit of Betty Lou Hunter.

Testimony from the Police Chief regarding the impact of crime at adult entertainment establishments was also considered by Council prior to their vote. The Defendants reasonably relied upon these studies and testimony. See Affidavit of Frank T. Ayers, Affidavit of Paul Sabiston, Affidavit of Daniel (Dan) O. Cox, Sr., Affidavit of James C. Dodd, Jr., Affidavit of M.C. (Pete) Waldrep, Jr., and Affidavit of Betty Lou Hunter.

The Court is cognizant of the fact that the City of Marietta did not perform independent investigations of its own. However, the Georgia Supreme Court has made clear that the efficacy of the studies which the Defendants did consider is not the focus, but rather the reliance of the city on the studies when adopting the ordinance. *Dudley's*, supra, *Parker*, supra. Therefore, with respect to the issue of the evidence considered in amending its ordinance the City has met the requisite burden.

Plaintiffs further argue that the ordinance violates free speech because it is content-based. Only a content-

neutral ordinance or statute is subject to the "Paramount test". *Club Southern,* supra. The Georgia Supreme Court has previously rejected the contention of Plaintiffs in this case. *See S.J.T., Inc. v. Richmond County, Georgia,* 263 Ga. 267, 430 S.E.2d 726 (1993); *Gravely v. Bacon,* 263 Ga. 203, 429 S.E.2d 663 (1993). An ordinance regulating adult entertainment establishments, such as the Ordinance in this case, is content-neutral. The Court finds that the Plaintiffs' claims to the contrary are without merit.

The language of the ordinance shows that the government interest is unrelated to the suppression of speech. Unlike the ordinance in *Harris v. Entertainment Sys.,* 259 Ga. 701, 386 S.E.2d 140 (1989), the ordinance here is narrowly drawn to further the Defendants' interest in preventing the negative effects associated with adult entertainment establishments offering nude dancing and alcohol.

> "A carefully and narrowly drawn regulatory scheme which makes appropriate distinctions between public and private behavior and which impacts only those modes of expression which, in the experience of local governments, tend to be the focal points of negative effects such as increased crime, can pass constitutional muster notwithstanding some restriction of protected expression."

Pel Assoc. v. Joseph, 262 Ga. 904, 907, 427 S.E.2d 264 (1993). *Accord S.J.T., Inc. v. Richmond County,* 263 Ga. 267, 430 S.E.2d 726, 728 (1993). The Court notes that the ordinance does state, "[T]his section (8-5032) shall not apply nor prohibit the live performance of legitimate plays, operas, ballets at mainstream theaters, concert halls, museums or

educational institutions holding a license which derives less than twenty percent (20%) of its gross receipts from the sale of alcoholic beverages." This same exception and the 20% restrictions were upheld by the Court in *S.J.T., Inc.*, supra.

The Court finds that, from the evidence considered by Defendants at the public hearing, the Defendants found the potential for crime and lower property values to be the motivating factor behind the enactment of the ordinance. Thus, the Defendants met their burden of satisfying the three-part "Paramount test", and the Court further finds that the ordinance is a proper exercise of the Defendants' police powers.

Although this Court's analysis has heretofore been based upon the "Paramount test", it is important to note that the "Paramount test" predates a constitutional amendment delegating Twenty First amendment powers to local governments. Previously, the Georgia courts held that although a state may have a certain amount of its police power restored to it under the Twenty First Amendment that would otherwise be limited under the First Amendment, the expression is still within the purview of the First Amendment. Therefore, it is still protected by Georgia's free expression guarantees. "Because Georgia ha[d] no constitutional equivalent to the Twenty First Amendment, the State's police power, though possibly not limited under the U.S. Constitution, is limited by Georgia's constitution." *Harris v Entertainment Sys., Inc.*, at 703.

Notwithstanding the ordinance's compliance with the "Paramount test", it is imperative that the Court

recognize the amendment to the Georgia Constitution. In its most recent opinion on the issue of adult entertainment the Georgia Supreme Court notes that, "[b]oth the federal and state constitutions offer protection to some forms of nude dancing, since it is 'expressive conduct within the outer perimeters of the First Amendment' " *Chambers*, supra. By way of a footnote however, the Court further explained "While the Twenty-first Amendment to the federal constitution sanctions infringement on expressive rights through state regulation of the sale of alcohol, the Georgia Constitution provided no equivalent police power when the ordinance in question was passed by the Peach County Board of Commissioners, or when enforcement proceedings were initiated in the trial court . . . A month after the county filed this suit, the voters of Georgia ratified a constitutional amendment which authorizes state regulation of the sale of alcohol, and delegates that authority to local government." *Chambers*, supra.

It is not disputed that the ordinance passed by the City of Marietta was done so pursuant to the constitutional amendment referenced by the Court in *Chambers*. Therefore, this Court, while having addressed the "Paramount test", finds the position of the City of Marietta is strengthened based on the existence of the Georgia amendment. The Defendants had the authority to regulate alcohol and this power also included the power to ban nude dancing in establishments that sell alcohol. Accordingly, based on the foregoing, the amendment to the Defendants' Adult Entertainment Ordinance is constitutional.

Plaintiffs argue that the City's ordinance is unconstitutional because it operates as a taking, impairs contractual obligations, and due process rights. In so doing, the Plaintiffs contend that their alcohol and adult entertainment licenses are protected property interests, and as such, can not be taken away without procedural due process.

Plaintiffs have asserted that the recent Georgia Supreme Court decision of *Recycle and Recover, Inc. v Georgia Board of Natural Resources*, Nos. S-95-A-1445 (1-22-96) bolsters their position. Said case involved a landfill operation. The Georgia Board of Natural Resources issued a permit to Recycle and Recover, Inc. for the construction of the landfill. Recycle then applied for a permit for a major modification, but, subsequent to the application the state legislature amended the applicable statute, O.C.G.A. 12-8-24, to prohibit any major modification of a landfill within three years from the beginning of operations. Therefore, the Georgia Board of Natural Resources denied the permit application.

On appeal Recycle argued that the Board's decision giving retroactive effect to the amended statute constituted an unconstitutional application. After determining that the passage of the amendment was an exercise of police power the Court explained, "[A]n enactment under the police power does not ordinarily violate any constitutional prohibition against retroactive statues [sic]. Nevertheless, our Constitution forbids passage of retroactive laws which injuriously affect the vested rights of citizens." *Recycle*, supra. The Court further defined vested rights as "interest which it is proper for (the) state to

recognize and protect and of which (the) individual cannot be deprived arbitrarily without injustice." *Recycle*, supra. The Court found that if a property owner becomes an actual applicant seeking to alter the use of his land, he has a vested right to consideration of his application under the statutory law then in existence, and held that the amendment could not have retroactive effect over Recycle.

The within case does not involve the Plaintiffs seeking to alter the use of their land. The within case involves two licenses, one for alcohol and one for adult entertainment, which are required to be renewed each year. The Plaintiffs' licenses expired on December 31st of each year. The amendment ordinance at issue was adopted on January 19, 1995, but had a delayed effected date as to the Plaintiffs of January 1, 1996.

Therefore, the Court agrees that the ordinance applied prospectively as to each of the Plaintiffs, and rejects the argument that same is being applied retroactively. The laws in effect on January 1, 1996, were Art. 3, Sec. 6, Para. 7 of the Georgia Constitution, same giving the City of Marietta the authority to regulate adult entertainment in connection with the sale or consumption of alcohol, and Section 8-503 of the Marietta City Code, same prohibiting the sale of consumption of alcohol at adult entertainment establishments. The Court finds that *Recycle* is consistent with the City's prospective application of the adult entertainment ordinance as effecting [sic] the Plaintiffs in this case.

Notwithstanding the *Recycle* opinion, the Court notes that there is not a constitutionally protected property

interest in a liquor license. *Top Shelf, Inc.* at 911. As explained above, Defendants did not deprive the Plaintiffs of their existing 1995 licenses. The Court has already rejected the Plaintiffs' contention that they have a vested property right to the *renewal* of their liquor licenses in the future. Moreover, the Georgia Supreme Court has found that there is no such property right under Georgia law. *Jackson v. The Three Aces Co., Inc.*, 249 Ga. 395, 291 S.E.2d 522 (1982).

In *Jackson*, the Supreme Court held that not even the expenditure of substantial funds ($40,000.00) upon a location which was not in compliance with the zoning code could authorize the issuance of a license. Furthermore, the Court held that the Twenty-First Amendment granted the State broad and sweeping authority to refuse a liquor license in conjunction with non-obscene adult entertainment. See also *City of Hampton v Briscoe*, 207 Ga. App. 501, 428 S.E.2d 411 (1993) in which the denial of the renewal of a business license in an improper zoning category was upheld because the applicant did not acquire any vested rights therein.

Plaintiffs have failed to demonstrate that they have a property interest or vested right and therefore, they cannot maintain a due process claim. Accordingly, Plaintiffs were not entitled to cross-examination at the public hearing. However, the Court notes that with respect to the due process given the Plaintiffs as to the adoption of the amended ordinance, the Court notes that the record shows that prior to the adoption of the amendment to the ordinance, Defendant posted notice twenty four hours in advance of the public hearing and notified the Plaintiffs personally of such meeting. Attorneys for the Plaintiffs

appeared in opposition to the ordinance. In total, eighteen people were allowed to testify before the City Council on both sides of the issue.

In effect, as no vested right has been proven, the Ordinance is not an impermissible ex post facto or retroactive law and therefore, there is no breach or impairment of contract. *See Keenen v. Hardison*, 245 Ga. 599, 266 S.E.2d 205 (1980). Furthermore, the Court in *S.J.T., Inc. v. Richmond County*, 263 Ga. 267, 430 S.E.2d 726, 730 (1993) rejected arguments similar to those made by Plaintiffs in this case. In *S.J.T.*, appellant argued that the ordinance denied them due process and unconstitutionality impaired their contracts by forcing them to derive income from sources other than by the sale of alcoholic beverages. The Court found that the licenses issued to appellant did not establish any vested right, contractual or otherwise, to both operate a bar and offer nude dancing. *S.J.T.* at 730.

The Court finds that the Plaintiffs' taking claim is also without merit. The Ordinance was enacted within the City's police power and is not a taking or damaging of property without just compensation. *See McCoy v. Sanders*, 113 Ga.App. 565, 148 S.E.2d 902 (1966); *Lewis v. Dekalb County*, 251 Ga. 100, 303 S.E.2d 112 (1983). There has been no "taking" as Plaintiffs have not been deprived of all viable economic uses of their property. *Rymer v. Douglas County*, 764 F.2d 796, 800 (11th Cir. 1985). The Plaintiffs are free to continue the operation of their business as adult entertainment establishments, without the consumption of alcohol by their patrons, or as bars or nightclubs, without the provision of adult entertainment for their patrons.

Plaintiffs further present the argument that the ordinance is a violation of equal protection and an unconstitutional prior restraint. The rational relationship test is employed to determine whether a city may differentiate under its Twenty-First Amendment powers. *Top Shelf,* supra. Under this standard, an enactment should be upheld if the disparity of treatment is rationally related to a legitimate government purpose. The governing body need not articulate the rationale but the classification may be upheld if "any reasonably conceivable state of facts" could support it. *Top Shelf,* supra.

Case law in the area is clear that a. city may regulate and classify adult entertainment establishments differently than other places of entertainment. *Gravely v. Bacon,* supra; *Parker v. Whitfield County,* supra. Where the purpose of the ordinance is to regulate alcohol in adult entertainment establishments, the Courts have rejected an equal protection challenge and found such to be a valid distinction. *See S.J.T.,* supra; *Pel Assoc.,* supra. Also, in *Top Shelf,* supra, the Court found that an ordinance similar to the one at issue in the case at bar to be rationally related to the legitimate governmental purposes of public health, safety and welfare. *Top Shelf,* at 909.

The evidence produced at the hearing showed that Defendants' ordinance was rationally related to the legitimate governmental purpose of (1) public health, safety and welfare; (2) crime prevention and (3) maintenance of property values and thus, the ordinance does not violate equal protection. The ordinance is not an unconstitutional prior restraint. This ordinance is analyzed under the Twenty-First Amendment in light of the Georgia Constitutional Amendment and is a proper exercise of that

authority. However, it is clear that under the "Paramount test", the licensing of adult entertainment establishments is not a per se violation of the First Amendment. *Club Southern* at 819.

Finally, Plaintiff, Boomer's challenges the 15 day waiting period in the ordinance. Boomer's asserts that the waiting period is a prior restraint in that it would require any independent contractor outside of the premises, as well as those working inside of the premises to be approved, and thus, said section is unconstitutional.

Section 8-20-100(b) of the ordinance provides, in part, as follows:

> "The City shall have 15 days to investigate the information required by the employee. If the employee is found to be of good moral character, the permitting officer shall grant approval of employment."

The Court finds that this 15 day waiting period in order to run a criminal background check on employees is constitutional. *See Southern Burlesque v. City of Carrollton*, 265 Ga. 528, 457 S.E.2d 816 (1995).

With respect to the City's ordinance and its application to the Plaintiffs, the Court finds in sum that same does not deprive Plaintiffs of all licenses or uses of their property. The Ordinance does however place a constitutional limitation on the licenses which Plaintiffs may receive. Each Plaintiff may, under the new Marietta City Ordinance, apply for and receive an adult entertainment license, if it so desires, provided it is not accompanied by an application for any type of alcohol license. Defendants are not required, under the terms of the Ordinance, to

issue both an alcoholic beverage and adult entertainment license. The choice remains with the Plaintiffs and all others similarly situated within the City of Marietta.

Plaintiffs are alleging that the individual Defendants are personally liable for their actions in voting on and approving the ordinance and are seeking sums in amounts in excess of $15,000,000 in damages. Plaintiffs claim that the individuals' actions were undertaken with improper motives and without authority of law. Plaintiffs assert a state and federal claim under Section 1983. Plaintiffs also claim that Defendants committed the tort of intentional infliction of economic harm. Defendants argue that they are entitled to absolute immunity. The Court agrees.

Plaintiffs rely on O.C.G.A. 36-33-4 which provides:

> "[m]embers of the council and other officers of a municipal corporation shall be personally liable to one who sustains special damages as the result of any official act of such officers if done oppressively, maliciously, corruptly, or without authority of law."

The Court finds that there is no evidence that the individual Defendants acted oppressively, maliciously, corruptly or without authority of law. The Defendants acted under the authority of the recent Georgia Constitutional Amendment and as previously set forth herein, Defendants met their burden of proving that they complied with the "Paramount test". Defendants did not violate clearly established statutory and constitutional rights.

The Ordinance enacted by the Defendants was constitutional, and the individual Defendants are entitled to

absolute legislative immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Healy v. Town of Pembroke Park*, 831 F.2d 989 (11th Cir. 1987). Alternatively, the Court finds that the individual Defendants are entitled to immunity under O.C.G.A. 51-1-20 which provides immunity from civil liability to persons serving with or without compensation as a member . . . of any local government agency, board, authority or entity . . . for any act or omission to act arising out of such service if such person was acting in good faith within the scope of his or her official actions and duties and unless damage or injury was caused by the willful or wanton misconduct of such person. O.C.G.A. 51-1-20. The Court finds that the individual defendants were acting in good faith within the scope of their official capacity, without willful or wanton misconduct. Therefore, this Court rejects any and all arguments that the individual Defendants are personally liable for their actions taken with respect to the passage of the amended ordinance.

Conclusion

In ruling on a motion for summary judgment, a court does not try the case but merely determines from the record whether there are any genuine issues of fact for determination by a jury. *Flanders v Columbia Nitrogen Corporation*, 135 Ga, [sic] App. 21, 217 S.E.2d 363 (1975). The purpose of summary judgment is to eliminate the necessity of trial where, giving the non-movant the benefit of all reasonable doubts and all favorable inferences that may be drawn, nevertheless the movant is entitled to a judgment as a matter of law. *Bowman v United States Life Insurance Co.*, 167 Ga.App. 673, 307 S.E.2d 134 (1983). "To

succeed on a motion for summary judgment, the movant must show that he or she is entitled to judgment as a matter of law." *Colquitt County Hospital v Health Star, Inc.*, 262 Ga. 285, 417 S.E.2d 147 (1992).

Based on the foregoing, this Court finds that the Defendants have met the requisite burden and hereby grants summary judgment as to Count One, Declaratory Judgment and declares that the Georgia Constitutional Amendment was properly ratified as a matter of law and that the Marietta Ordinance was properly enacted under the authority of the Georgia Constitutional Amendment and properly enacted under the "Paramount test". Plaintiff, Boomer's is not entitled to the refund of its business license fees as requested in Court [sic] Nine of its Complaint.

Plaintiff, Cyprus requested a mandamus to require Defendants to issue all licenses for 1996 to allow nude dancing and the consumption of alcohol on the premises. In light of the Court's findings that the ordinance is constitutional, this request is denied. Plaintiff does not have a clear legal entitlement to the remedy sought. Additionally, the Court finds that this request is moot in light of the Temporary Consent Agreement entered into by the parties which allows the Plaintiffs to remain open until a final resolution of the matter by the appropriate appellate courts. Summary Judgment is also granted as to Count Three of Cyprus's Section 1983 claim.

Plaintiff's Motion to Strike the studies considered and submitted by Defendants in support of their Motion for Summary Judgment is also denied. Plaintiff's request

for a temporary restraining order and permanent injunction is denied. Plaintiffs are not entitled to attorney's fees and punitive damages.

Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED that there is no genuine issue as to any material fact and that Defendants are entitled to summary judgment on all Counts as a matter of law.

Notwithstanding the above ruling, the Court reincorporates the Consent Temporary Order entered on or about December 15, 1995. Therefore, Taj Mahal, Boomer's and Cyprus can maintain the status quo and continue to operate and offer nude dancing and alcohol as they have presumably done pursuant to said Order from January 1, 1996, until the parties have exhausted all appeals through the Georgia Supreme Court level. The rest and remainder of the terms of said Order continue in full force and effect.

So ORDERED this 2nd day of April, 1996.

/s/ James G. Bodiford
JAMES G. BODIFORD, Judge
Superior Court of Cobb
Cobb Judicial Circuit

Code of Ordinances of the City of Marietta, Georgia

Section 8-5032

AN ORDINANCE

Findings; Public Purpose; Legal Authority. (a) Based upon the experience of other urban counties and municipalities, which experiences we believe are relevant to the problems faced by City of Marietta, Georgia, and based upon a review of a report from the Marietta City Police Department summarizing the criminal activity surrounding the three (3) existing license holders within the City of Marietta, we take note of the notorious and self-evident conditions attendant to the commercial exploitation of human sexuality, which do not vary greatly among generally comparable communities within our country. Moreover, it is the finding of the City Council of Marietta that public nudity (either partial or total) under certain circumstances, particularly circumstances related to the sale and consumption of alcoholic beverages in so-called "nude bars" or establishments offering so-called "nude entertainment" or "adult entertainment", begets criminal behavior and tends to create undesirable community conditions. Among the acts of criminal behavior identified with nudity and alcohol are disorderly conduct, prostitution, and drug trafficking and use. Among the undesirable community conditions identified with nudity and alcohol are depression of property values in the surrounding neighborhood, increased expenditure for the allocation of law enforcement personnel to preserve law and order, increased burden on the judicial system as a consequence of the criminal behavior hereinabove described, and acceleration of community blight by the concentration of such establishments in particular areas.

Therefore, the limitation of nude conduct in establishments licensed to sell alcohol for consumption on the premises is in the public welfare and it is a matter of governmental interest and concern to prevent the occurrence of criminal behavior and undesirable community conditions normally associated with establishments which serve alcohol and also allow and/or encourage nudity. To that end, this Ordinance is hereby adopted.

(b) This ordinance is also adopted pursuant to the authority granted by Article IX, Section II, Paragraph X of the Constitution of the State of Georgia.

BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF MARIETTA, GEORGIA, THAT:

Section 1. The Code of Marietta, Georgia, is hereby amended to add section 8-5032 which shall read as follows:

> "8-5032
> No person, association, partnership or corporation receiving an initial license under Chapter 5 of Part 8 of the Marietta City Code after January 11, 1995 shall serve, sell, distribute or suffer the consumption or possession of any intoxicating liquor or controlled substance upon the premises of any licensee. This section shall not apply to a renewal license which was initially granted before January 11, 1995 and which is renewed after January 11, 1995."

Section 2. It is hereby declared to be the intention of this Ordinance that its sections, paragraphs, sentences, clauses and phrases are severable, and if any section, paragraph, sentence, clause or phrase of this Ordinance is declared to be unconstitutional or invalid, it shall not

affect any of the remaining sections, paragraphs, sentences, clauses or phrases of this Ordinance.

Section 3. All Ordinances or parts of Ordinances in conflict with this Ordinance are hereby repealed.

Section 4. This Ordinance shall become effective upon the signature or without the signature of the Mayor, subject to Georgia laws 1983, page 4119.

DATE: January 19, 1995 APPROVED:

ATTEST:

ANSLEY LITTLE
MEADERS, Mayor

SHEILA R. HILL,
City Clerk

APPROVED AS TO FORM:

DOUGLAS R. HAYNIE,
CITY ATTORNEY

Supreme Court, U.S.
FILED
JUL 28 1997
CLERK

No. 96-2035

In The

Supreme Court of the United States

October Term, 1996

VARSALONA'S ITALIAN RESTAURANT d/b/a BOOMER'S and PATRICK VARSALONA,

Petitioners,

vs.

THE CITY OF MARIETTA, BETTY L. HUNTER, M.C. PETE WALDREP, JR., DANIEL O. COX, SR., E. PAUL SABISTON, JAMES C. DODD, FRANK T. AYERS, PHILLIP GOLDSTEIN and ANSLEY L. MEADERS,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF MARIETTA

MICHAEL A. O'QUINN
BARNHART, O'QUINN
& WILLIAMS, LLP
162 Keys Ferry Street
McDonough, Georgia 30253
(770) 898-0333

DOUGLAS R. HAYNIE
Counsel of Record
EMILIE K. PETROVICH
HAYNIE & LITCHFIELD, P.C.
222 Washington Avenue
Marietta, Georgia 30060
(770) 422-8900

Attorneys for Respondent City of Marietta

71611 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

LIST OF INTERESTED PARTIES

The Petitioners are Varsalona's Italian Restaurant d/b/a Boomer's and Patrick Varsalona as listed in the caption.

The Respondents are correctly identified in the caption with the exception of Phillip Goldstein which is misspelled. The correct spelling is "Philip". The Respondent City of Marietta has no parent or subsidiary companies. The City of Marietta is a political subdivision of the State of Georgia.

TABLE OF CONTENTS

Page

List of Interested Parties i

Table of Contents ii

Table of Citations iii

Statement of Jurisdiction 1

Statement of the Case 1

A. Course of Proceedings and Disposition of the Case Below 1

B. Corrections of Misstatements in the Petition .. 2

Reasons for Denying the Writ 3

I. The Georgia Supreme Court Properly Concluded That The Ordinance At Issue Was "Content-Neutral" And That The Respondents Met Their Burden Of Proof In Showing That The Predominate Purpose Behind The Ordinance's Enactment Was To Prevent Pernicious Secondary Effects Associated With Adult Entertainment Establishments. 3

II. The Due Process Clause Of The Fourteenth Amendment Is Not Implicated In This Case As There Is No Vested Property Right In The Renewal Of A License Which Expires On An Annual Basis. 13

Conclusion 19

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Atkins v. Parker, 472 U.S. 115 (1985) 18

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) 4, 5

Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2704, 48 L. Ed. 2d 684 (1976) 14

Board of Regents v. Roth, 408 U.S. 564 (1972) 14, 16, 17

Cabo Distrib. Co. v. Brady, 821 F. Supp. 582 (N.D. Cal. 1992) 16

Chambers d/b/a "Neon Cowboy" v. Peach County, 467 S.E. 2d 519 (Ga. 1996) 4, 7

City of Ramsey v. Holmberg, 548 N.W. 2d 302 (Minn. App. 1996), *cert. denied,* __ U.S. __ (1997) 4

City of Renton v. Playtime Theaters, Inc., 457 U.S. 41 (1985) 4, 5, 8, 18

Club Southern Burlesque v. City of Carrollton, 265 Ga. 528, 457 S.E. 2d 816 (1995) 4

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) 14

Contents

Page

Discotheque v. City Council of Augusta, 264 Ga. 623, 449 S.E. 2d 608 (1994) 7

Dudley's Food & Spirits v. College Park, 265 Ga. 618, 458 S.E. 2d 823 (1995) 4

Ficarra v. Department of Regulatory Agencies, 849 P.2d 6 (Colo. 1993) 16

Goldrush II, Inc. v. City of Marietta, 267 Ga. 683, 482 S.E. 2d 347 (Ga. 1997), *reconsideration denied*, April 3, 1997, *petition for cert. filed*, (U.S. June 26, 1997) (No. 96-2035) 1

ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413 (8th Cir.), *cert. denied*, __ U.S. __, 115 S. Ct. 578, 130 L. Ed. 2d 493 (1994) 4

Krueger v. City of Pensacola, 759 F.2d 851 (11th Cir. 1985) 12, 13

Mitchell v. Com'rs of Com'n on Adult Ent. Est., 802 F. Supp. 1112 (D. Del. 1992), 10 F.3d 123 (3rd Cir. 1993) 4

North Avenue Novelties, Inc. v. City of Chicago, 88 F.3d 441 (7th Cir. 1996), *cert. den.*, __ U.S. __ (1997) *citing Young v. American Mini Theatres*, 427 U.S. 50 10

Paramount Pictures Corp. v. Busbee, 250 Ga. 252, 297 S.E. 2d 250 (1982) 3, 10, 11, 12, 18

Contents

	Page
Phillips v. Borough of Keyport, 107 F.3d 164 (3rd Cir. 1997)	13
Ranch House, Inc. v. City of Anniston, 678 So. 2d 745 (Ala. 1996)	9
S.J.T. Inc. v. Richmond County, 263 Ga. 267, 430 S.E. 2d 726 (1993)	16
United States v. O'Brien, 391 U.S. 367 (1968)	8, 10, 11, 18
Statutes Cited:	
28 U.S.C. § 1257(a)	1
O.C.G.A. § 3-2-7	14
O.C.G.A. § 50-14-1	18
Marietta City Code § 8-2-200(A)	14
Marietta City Code § 8-8-2-130(A)(10)	15
Marietta City Code § 8-20-170	15
United States Constitution Cited:	
First Amendment	4, 6, 10, 11, 13
Fourteenth Amendment	6, 13, 14, 16
Twenty First Amendment	14

Contents

Page

Rule Cited:

Supreme Court Rule 15.1 2

Other Authority Cited:

Article III, Section VI, ¶ VII of the Constitution of the State of Georgia 14

APPENDIX

Appendix A — Code of Ordinance of the City of Marietta, Georgia, Section 8-5032 ..... 1a

Appendix B — Annual Business License of Varsalona's Italian Restaurant d/b/a Boomer's 5a

Appendix C — Article III, Section VI, Paragraph VII of the Constitution of the State of Georgia 6a

Appendix D — Official Code of Georgia Annotated, Section 3-2-7 ..... 7a

Appendix E — Affidavit of Councilman Frank T. Ayers 8a

The Respondents, City of Marietta *et al.*, hereby oppose the petition of Petitioners, Varsalona's Italian Restaurant d/b/a Boomer's and Patrick Varsalona for a writ of certiorari to review the decision of the Georgia Supreme Court decided March 17, 1997, and request that the Court deny the petition for the reasons set forth below. The Georgia Supreme Court opinion is reported as *Goldrush II, Inc. v. City of Marietta*, 267 Ga. 683, 482 S.E. 2d 347 (Ga. 1997), *reconsideration denied*, April 3, 1997, *petition for cert. filed*, (U.S. June 26, 1997) (No. 96-2035). For the convenience of the Court, all citations to the opinion of the Georgia Supreme Court will be to the opinion attached as Appendix 1-32 of the petition.

The opinion of the Cobb County Superior Court filed April 2, 1996 is unreported and all references to that opinion will be to the opinion attached as Appendix 33-62 of the petition.

STATEMENT OF JURISDICTION

This Court has jurisdiction over questions I and II presented by Petitioners pursuant to 28 U.S.C. § 1257(a). Notwithstanding, Respondents incorporate their jurisdictional objections regarding any questions over the procedures at the public hearing of January 19, 1995. *See* page 18 of Opposition Brief to petition of Mukesh Shretta *et al.* objecting to jurisdiction over question III.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

This petition represents the second petition for writ of certiorari from consolidated appeals before the Georgia Supreme Court.[1] Respondents reference and incorporate as if fully set

1. Initially, three adult entertainment clubs filed suit against (Cont'd)

forth herein, their Brief in Opposition to the petition of Mukesh Shretta *et al.* The factual and procedural background of this case is summarized in Respondents' first Opposition Brief and more fully set forth in the Georgia Supreme Court opinion attached to the petition as Appendix 1-32. Further, the arguments advanced by these Petitioners are substantially similar to those already advanced by Petitioners, Mukesh Shretta *et al.* in their petition.

B. Correction of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.1, Respondents also bring the following misstatements of facts contained in the petition to the Court's attention:

Petitioners mislead this Court by continually stating that there were two dissents to the Georgia Supreme Court opinion. The Georgia Supreme Court affirmed the grant of summary judgment to Respondents by the trial court with Justice Sears being the lone dissenter. Petitioners filed a Motion for Reconsideration which the Georgia Supreme Court denied. Justice Sears and Justice Carley dissented to the denial of the Motion for Reconsideration. Justice Carley's dissent, however, cannot be construed as a separate dissent or as a joinder in Justice Sears' dissent. Justice Carley simply dissented from the denial of the Motion for Reconsideration, but gave no reasons for his dissent.

(Cont'd)
Respondents challenging the amendment to the City's ordinance, and the cases were consolidated in the Superior Court of Cobb County. The cases were then decided in consolidated appeals before the Georgia Supreme Court. Petitioners Mukesh Shretta *et al.* filed their petition on June 12, 1997 and Respondents filed their Opposition Brief on July 14, 1997. In the interim, Petitioners *Varsalona's Italian Restaurant et al.* filed their petition on June 26, 1997. The third adult entertainment club, Cyprus Lounge, did not file a petition.

Petitioners also make the same mistake made by Petitioners Mukesh Shretta and Gold Rush II, d/b/a Club Taj Mahal in their petition by failing to attach a correct copy of the ordinance passed by the City of Marietta and at issue in this case. The differences between the ordinance set forth in the petition and the correct ordinance as passed by the Marietta City Council are set forth in Respondents' Opposition Brief to the petition of Mukesh Shretta *et al.* Respondents include the correct copy of the ordinance in its Opposition Brief. *See* Appendix A.

REASONS FOR DENYING THE WRIT

This case is the latest entry in Georgia's free expression jurisprudence in the context of nude dancing which began with the landmark case of *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 297 S.E. 2d 250 (1982). The Cobb County Superior Court and the Georgia Supreme Court both devoted substantial time and resources to reviewing the issues in this petition, and correctly determined that the City's adult entertainment ordinance was constitutional. As the petition raises no new issues for this Court's review, the petition should be denied.

I.

THE GEORGIA SUPREME COURT PROPERLY CONCLUDED THAT THE ORDINANCE AT ISSUE WAS "CONTENT-NEUTRAL" AND THAT THE RESPONDENTS MET THEIR BURDEN OF PROOF IN SHOWING THAT THE PREDOMINATE PURPOSE BEHIND THE ORDINANCE'S ENACTMENT WAS TO PREVENT PERNICIOUS SECONDARY EFFECTS ASSOCIATED WITH ADULT ENTERTAINMENT ESTABLISHMENTS.

Petitioners initially argue that review is warranted because this Court has not addressed a case involving nude dancing and

the First Amendment since *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). Petitioners also claim that certiorari should be granted because there was no majority opinion in *Barnes* and therefore, the decisions of the lower courts have been inconsistent. All such claims are without merit.

It is undisputed that the *Barnes'* decision yielded no majority opinion[2], and that the decision has sparked much academic debate over the concurring and dissenting opinions of the nine Justices, but it is simply untrue that the decisions of the lower federal and state courts concerning regulation of nude dancing have been inconsistent since *Barnes*. There is no authority to support Petitioners' arguments, and Petitioners cite none. Petitioners also fail to delineate the alleged inconsistencies. That is because the established precedent set by this Court in the landmark case of *City of Renton v. Playtime Theaters, Inc.*, 457 U.S. 41 (1985) has been consistently followed by the federal and state courts,[3] and this Court's opinion in *Barnes* did not in any way alter the majority opinion in *Renton* that:

---

2. It was clear, however, that the majority of Justices agreed that nude dancing is considered "expressive conduct" within the outer perimeters of the First Amendment. *Barnes*, 501 U.S. 560 (1991) (plurality opinion). However, that is not to say that such expressive conduct may not be restricted or regulated in any way. *Chambers d/b/a "Neon Cowboy" v. Peach County*, 467 S.E. 2d 519, 521 (Ga. 1996).

3. *See ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir.), *cert. denied*, __ U.S. __, 115 S. Ct. 578, 130 L. Ed. 2d 493 (1994); *City of Ramsey v. Holmberg*, 548 N.W. 2d 302 (Minn. App. 1996), *cert. denied*, __U.S __ (1997); *Mitchell v. Com'rs of Com'n on Adult Ent. Est.*, 802 F. Supp. 1112 (D. Del. 1992), 10 F.3d 123, 133 (3rd Cir. 1993); *Dudley's Food & Spirits v. College Park*, 265 Ga. 618, 458 S.E. 2d 823 (1995); *Club Southern Burlesque v. City of Carrollton*, 265 Ga. 528, 457 S.E. 2d 816 (1995). It is clear that the federal and state courts have consistently held that under *City of Renton*, a city may rely on the experience of, and studies produced by, other cities regarding the adverse secondary effects linked with adult businesses in passing ordinances to address such problems. *Renton*, 457 U.S. at 51.

> The First Amendment does not require a city, before enacting an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

457 U.S. at 51.

In fact, Justice Souter's concurring opinion in *Barnes* expressly rejects a requirement of local affirmative evidence of secondary effects and reinforces the conclusion of this Court that a city is not required to litigate the issue of secondary effects in every case. *See Barnes* at 584-85. A city is simply required to prove that it considered specific evidence of pernicious secondary effects and that the city reasonably believed such evidence to be relevant to the problems addressed by the City. *Renton* at 51.

Petitioners' allegations that Respondents were required to go beyond the requirements established in *Renton* and reaffirmed in *Barnes* are unsupported by current authority, and Petitioners present no compelling reason for this Court to alter this well-established precedent.

In this case, an incident which occurred after enactment of the ordinance illustrates that Respondents were justified in relying on the studies of other communities which detail the pernicious secondary effects of alcohol and adult entertainment. On July 19, 1996, a patron entered the Cyprus Lounge, one of the adult entertainment clubs in the city limits[4], and consumed

---

4. Cyprus Lounge was an appellant in the consolidated appeals before the Georgia Supreme Court but did not file a petition for certiorari.

alcoholic beverages for many hours while viewing nude dancing. The intoxicated patron left the Cyprus Lounge and was involved in a collision with another vehicle in which the driver was seriously injured and the driver's wife was killed. The patron entered a guilty plea to the charges[5] and is currently serving his sentence.

Petitioners further allege that the real purpose behind the ordinance was to censor and suppress free expression. Such allegations ignore the abundant evidence in the record, and the practical applicability of the ordinance. Petitioners chide the trial court for granting summary judgment claiming that "contrary evidence" existed. Petitioners also state that there was abundant evidence *in the record* that the true purpose was censorship. However, this alleged "evidence" is never set forth in the petition. That is because it does not exist. Rather, Petitioners write generally about the constitutional principles of the First and Fourteenth Amendment, and the disservice to the legal system. It is apparent that Petitioners hope their trumped up allegations along with reference to the "pillars" of the Constitution will catch this Court's attention without the benefit of supporting authority. That is simply not enough. The record speaks for itself and illustrates that both the trial court and the Georgia Supreme Court had ample evidence to support the grant of summary judgment to Respondents.

The evidence showed that the Respondents did not rely solely on its preamble as to the purpose of the ordinance.[6] Although the Georgia Supreme Court does reference the preamble to the ordinance, as correctly pointed out by

---

5. *See* footnote 14 of Respondents' Opposition Brief to petition of Mukesh Shretta *et al.*

6. *See* Opinion of Cobb County Superior Court, Appendix at 48; Opinion of Georgia Supreme Court, Appendix at 15.

Petitioners, the court has recognized that reliance on the verbiage in an ordinance's preamble is not enough. *See Chambers d/b/a "Neon Cowboy" v. Peach County*, 467 S.E. 2d 519, 521 (1996); *Discotheque v. City Council of Augusta*, 264 Ga. 623, 449 S.E. 2d 608 (1994). In both those cases, the Georgia Supreme Court rejected as insufficient the cities' reliance on the preamble alone to support the constitutionality of an ordinance regulating adult entertainment. The Georgia Supreme Court specifically recognized that the facts of this case differed from those in *Chambers* and *Discotheque* in that the Respondents did not rely solely on the statement in its preamble as to the purpose of the ordinance. Rather, Respondents affirmatively proved that they considered *specific* evidence of the pernicious secondary effects of adult entertainment establishments.

Prior to adoption of the ordinance at issue, Respondents held a public hearing lasting approximately four (4) hours and the transcript detailing the evidence considered by Respondents is one hundred and seventy four (174) pages in length. The Respondents were supplied with ten (10) studies from other communities consisting of five hundred and six (506) pages detailing the pernicious secondary effects of the sale of alcohol in adult entertainment establishments, and a 1991 Atlanta Business Chronicle article on the adult entertainment business in Atlanta, Georgia. Eighteen (18) persons, including four lawyers representing the adult entertainment clubs, testified before the Marietta City Council regarding the amendment to the City's ordinance. The owner of a "juice bar" also testified that the presentation of nude dancing without alcohol was an economically viable venture. An expert real estate appraiser testified that the property values surrounding the adult entertainment establishments had declined. The Chief of Police testified at length regarding the issue of crime in addition to presenting his report. After consideration of all testimony and evidence, Respondents voted six to one to amend its ordinance.

The Georgia Supreme Court specifically considered and rejected Petitioners' allegations that an improper motive motivated the enactment of the ordinance finding that there was insufficient evidence as a matter of law[7], and relying on the precedent of this Court that it is improper to further inquire into judicial motives. In *United States v. O'Brien*, 391 U.S. 367 (1968), this Court concluded that:

> judicial inquiry into legislative motives or purposes is a "hazardous matter" for what motivates one legislator to make a comment about a law is not necessarily what motives fellow legislators to enact the law.

Id. at 383.

Recognizing this important principle, this Court concluded in *Renton* that if it is established that the "predominate intent" of the enacted ordinance was to combat or avoid pernicious secondary effects, then the legislation is deemed to be content-neutral. *Id.* at 48. With these standards in mind, the Georgia Supreme Court properly concluded that Respondents met their burden of proving that the predominate goal in enacting the ordinance was to combat the pernicious secondary effects associated with adult entertainment establishments and therefore, the ordinance was content-neutral.

---

7. Petitioners contend in their petition that the Georgia courts ignored all evidence of alleged "censorship". Petitioners do not state what "evidence" they are referring to, but Respondents assume they are referring to the newspaper quotes of the Mayor and several council members. The Georgia courts did not ignore this evidence but in fact specifically reviewed this evidence and concluded that it was insufficient as a matter of law to prove improper motive, and did not override the overwhelming evidence in the record that the "predominate" purpose behind the ordinance was the prevention of the pernicious secondary effects associated with adult entertainment establishments. *See* Appendix 14-16.

The Georgia Supreme Court also considered the affirmative evidence which disputed the allegations of censorship. The affidavits of six council members and the Mayor were submitted into evidence in which each member testified under oath that they considered the numerous studies presented to them prior to enactment of the ordinance and that they reasonably believed such evidence to be relevant to the problems addressed by the city. Further, each member testified that their personal feelings did not enter into their legislative decision.

After consideration of all the testimony and evidence, the Respondents voted six to one to enact the ordinance at issue. *See* Appendix A of Respondents' Brief in Opposition to the Petition of Mukesh Shretta *et al.* Looking at the text of the ordinance at issue, it is clear that the ordinance is not directed at speech or expression but at a type of conduct. The ordinance does not prohibit or restrict nude dancing in any way, but simply prohibits the consumption of alcohol to occur simultaneously with adult entertainment. *See Ranch House, Inc. v. City of Anniston*, 678 So. 2d 745 (Ala. 1996).[8] Accordingly, despite Petitioners claims to the contrary, the Petitioners are free to continue the operation of their business as adult entertainment establishments, but without the consumption of alcohol by their patrons. *See* Appendix at 56. The ordinance does not eliminate or prohibit nude dancing.[9]

---

8. In *Ranch House*, the Alabama Supreme Court upheld an ordinance almost identical to Respondents finding that the ordinance was a valid exercise of the state's police powers. In a concurring opinion, Justice Cook observed that this type of ordinance only restricts the activities of the spectators and not the dancers' freedom of expression. *Id.* at 747.

9. As long as there is a "full opportunity for expression in all its varied forms to convey a desired message and that there [is] full opportunity for everyone to receive the message", then the free speech guarantees of the First

(Cont'd)

In analyzing the case, the Georgia Supreme Court recognized Petitioners' First Amendment rights and applied Georgia's traditional First Amendment analysis set forth in the landmark case of *Paramount Pictures v. Busbee*, 250 Ga. 252, S.E. 2d 250 (1982).[10] This three-prong analysis provides the basis for determining the constitutionality of an ordinance regulating adult entertainment, and states that an ordinance will be upheld if: (1) it furthers an important government interest; (2) the government interest is unrelated to the suppression of speech; and (3) if the incidental restriction on speech is no greater than is essential to the furtherance of that government interest. *Paramount* at 256. The Georgia courts properly applied the *Paramount* test to the facts of this case and concluded that the City's interest in reducing crime and preventing the deterioration of neighborhoods were important government interests; such

(Cont'd)

Amendment are satisfied. *See North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 444 (7th Cir. 1996), *cert. den.*, __ U.S. __ (1997) *citing Young v. American Mini Threatres*, 427 U.S. 50, 76 (J. Powell, concurring). In *North Avenue Novelties*, the Seventh Circuit upheld an ordinance regulating adult uses finding that the ordinance offered reasonable opportunity to disseminate speech and therefore, complied with the First Amendment. Specifically, the Seventh Circuit concluded that the ordinance did not prohibit sexually explicit expression, but merely required that such expression take place in specified areas and in a non-concentrated manner. Such restrictions were found to be content-neutral, served a legitimate government interest, and did not unreasonably limit alternative avenues of communication. *Id.* at 444. The same is true in this case: the ordinance at issue does not prohibit adult entertainment but merely requires that such entertainment not be combined with the sale or consumption of alcohol at the same location. The Georgia Supreme Court properly concluded that the ordinance was content-neutral and met the three prong test of *Paramount Pictures*. *See* Appendix at 16-18.

10. As set forth in Respondents' Opposition Brief to the petition of Mukesh Shretta *et al.*, Georgia's free expression analysis is derived from the framework established by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968). *See* footnote 2 of first Opposition Brief.

interests were unrelated to the suppression of speech; and that the ordinance's application was sufficiently narrow to achieve such interests.[11] Therefore, the enactment of the ordinance was a proper exercise of the City's police powers.

It is clear that the Georgia courts have not "rubberstamp[ed] restrictive legislation . . . " as alleged by Petitioners, but carefully considered the evidence in the record and applied Georgia's well-established First Amendment analysis as derived from this Court's framework in *O'Brien* and adopted by the Georgia courts in *Paramount Pictures*. The ordinance in this case met all three prongs of the test. Although Petitioners may disagree with the result, the Georgia courts properly determined that the ordinance was constitutional. The Georgia courts adhered truthfully and with great candor to the long-standing principles which serve as pillars to the U.S. Constitution, and preserved the First Amendment rights of Petitioners. The ordinance in this case does not ban expression or "unpopular speech". Nor does it restrict nude dancing. Rather, the ordinance prohibits the consumption of alcohol on the premises of an adult entertainment establishment.

Petitioners' speculation that the approach allegedly adopted by the Georgia courts in accepting the pronouncement of the government itself might be read as a basis for banning hostile political speech is unfounded. In fact, Petitioners miss the mark. The Georgia courts did not rely solely on the City's assertion that a legitimate purpose lay behind the enactment of the ordinance. Nor did the courts rely on the stated purpose in the preamble. The trial court held an extensive hearing and received evidence as to the purpose of the ordinance. The court then

---

11. It is interesting to note that Petitioners fail to ever reference the *Paramount Pictures* test in their petition. Nor do Petitioners attack the holding of the Georgia Supreme Court which finds that the Respondents met all three prongs of the test.

applied the three-prong *Paramount* test set forth above, and concluded that the ordinance was constitutional.

Petitioners' citation to *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985) as inconsistent with the Georgia Supreme Court's opinion is unavailing. In *Krueger*, the Eleventh Circuit held an ordinance regulating topless dancing unconstitutional and rejected the city's argument that the language in the preamble was evidence that its purposes in enacting the ordinance were proper. The city claimed that the language set forth in the preamble should end the court's inquiry into the purpose behind enactment of the ordinance given the restricted nature of the court's review. *Id.* at 855. The Eleventh Circuit then reviewed the evidence in the record and concluded that the evidence established that the purpose of the ordinance was censorship of the communication rather than legitimate government interests.

The Georgia Supreme Court was well aware of the *Krueger* decision as it had been referenced in the record, and the facts of this case are distinguishable. Here, the City did not argue that the language of its preamble was sufficient to support its purposes. Further, the city did not rely on post-hoc justifications, but supported its claims with evidence the City considered *prior* to enactment of the ordinance. In this case, the City considered specific studies detailing the secondary effects associated with adult entertainment establishments. In *Krueger*, there is no reference to any studies considered by the municipality prior to enactment of the ordinance. The City heard testimony from numerous witnesses which testified regarding the issue of crime and decreased property values which was absent from the record in *Krueger*. Furthermore, the Eleventh Circuit found that the evidence in *Krueger* conclusively established that improper motives motivated the legislation where the Georgia Supreme Court found that the evidence in this case was insufficient as a

matter of law to establish improper motive. Given these factual differences, the results of this case and *Krueger* were different but the principles applied by both courts were the same.

Similarly, Petitioners cite the case of *Phillips v. Borough of Keyport*, 107 F.3d 164 (3rd Cir. 1997) (en banc). This case is also distinguishable on the facts of the case. In *Phillips*, the ordinance was struck down as unconstitutional on the basis of a "bare" record where there was no evidence that the municipality had considered specific evidence of secondary effects associated with adult entertainment establishments. *Id.* at 173-174. Here, it is undisputed that the City considered specific evidence of secondary effects prior to enactment of the ordinance, and therefore, Respondents' ordinance was found to be constitutional.

Respondents submit that the Georgia courts properly applied traditional First and Fourteenth Amendment principles to the facts of this case, and that the "majesty" of such principles has been preserved. The evidence of this case simply dictated a result different from that hoped for by Petitioners.

II.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS NOT IMPLICATED IN THIS CASE AS THERE IS NO VESTED PROPERTY RIGHT IN THE RENEWAL OF A LICENSE WHICH EXPIRES ON AN ANNUAL BASIS.

Petitioners argue in question II that their licenses would have been renewed but for the amendment to the City's ordinance. Such arguments are not only speculative but irrelevant. The issue at the heart of this case is whether Petitioners' possessed a vested right to the renewal of their

alcohol and adult entertainment licenses despite the change in the law which prohibited the issuance of an alcohol and adult entertainment license for the same property.[12]

The constitutional principles underlying the answer to this question were established by this Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972): "To have a property interest . . . a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. Property rights are not created by the Due Process Clause of the U.S. Constitution, but instead arise by virtue of state law. *Bishop v. Wood*, 426 U.S. 341, 344, 96 S. Ct. 2704, 2077, 48 L. Ed. 2d 684 (1976). Once the property right becomes vested under state law, then the Due Process Clause controls the government's right to take it away. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Therefore, for the renewal of a license to fall under the protective umbrella of the Fourteenth Amendment, it must be deemed a "property interest".

The determination of what constitutes a "property interest" is made by looking at the statute or rule at issue. In this case, the City of Marietta code and Georgia statute regarding liquor and adult entertainment licenses govern.[13] Both the City code and the state statute expressly provide that liquor licenses expire at the end of each year and that a licensee must apply annually for each license. Similarly, the City code provides that an adult

---

12. The ordinance in this case was adopted by Respondents following ratification by the voters of an amendment to the Georgia Constitution on November 8, 1994 which delegated the State of Georgia's authority under the Twenty-First Amendment to the U.S. Constitution to counties and municipalities. *See* Article III, Section VI, Paragraph VII of the Constitution of the State of Georgia.

13. *See* Marietta City Code § 8-2-2-200(A); O.C.G.A. § 3-2-7.

entertainment license expires on an annual basis.[14] In order to be entitled to renewal, the applicant must meet annually the requirements set forth in the City code.[15]

In this case, the City, through the legislative process, altered the conditions for obtaining a license beginning on January 1, 1996.[16] The ordinance prohibited the holder of an adult entertainment license from serving, selling, distributing or suffering the consumption or possession of any intoxicating liquor, beer or wine or controlled substance upon the premises of any such licensee. The practical effect was to require the adult entertainment establishments to choose between either keeping their liquor license or keeping their adult entertainment license for the same premises after December 31, 1995 when their current licenses expired.[17] Under the amended ordinance, the Petitioners were not qualified to hold both licenses.[18] Therefore,

14. *See* Marietta City Code § 8-20-170.

15. *See* Marietta City Code § 8-8-2-130(A)(10); 8-20-170.

16. In December of 1995, all parties entered into a Consent Order whereby Petitioners could continue to serve alcohol and provide adult entertainment pending resolution of any appeals to the Georgia Supreme Court. After the Georgia Supreme Court issued its decision in March 1997, Petitioners applied for a Stay of Remittitur which was granted by the Georgia Supreme Court.

17. The Petitioners' 1995 liquor and adult entertainment licenses which were in effect at the time the ordinance was passed were not affected by passage of the ordinance. In other words, the Petitioners' 1995 licenses were not suspended or revoked in any manner. Rather, Petitioners were allowed to operate under their current licenses until expiration of such licenses at the end of the year. At that time, they were required by City code and state law to renew the licenses. *See* Appendix B – Copy of Boomer's beer/wine license which states on the face of the license that it expired on December 31, 1995.

18. The prohibition against simultaneously holding a liquor license and (Cont'd)

based on these provisions, the Georgia Supreme Court concluded that Petitioners did not have a vested right in the renewal of their licenses. The Court contrasted this result with state statutes where licenses are issued for an indefinite duration rather than on an annual basis. *See Cabo Distrib. Co. v. Brady*, 821 F. Supp. 582, 597 (N.D. Cal. 1992).

As Petitioners' licenses expired on an annual basis, they did not have a vested right in the law never changing. The Petitioners were aware of this annual renewal and there were no assurances that the licensing requirements would not change in the future. In *Ficarra v. Department of Regulatory Agencies*, 849 P.2d 6 (Colo. 1993), the Colorado Supreme Court held that a licensee who relies upon the requirements never changing does so at his own peril. *Id.* at 19. The expenditure of substantial sums by Petitioners in reliance upon the renewal of their licenses and with the expectation that the law would never change does not create a "vested property right" subject to protection of the Fourteenth Amendment. Rather, such amounts to a unilateral expectation of renewal which is simply not enough under the principles set forth in *Roth*.

Petitioners reference to the dissent of Justice Sears, which was not joined by Justice Carley[19], regarding Justice Sears' disagreement with the distinction between licensing and zoning, does not change the result of this case. A detailed rationale for this distinction is set forth in Respondents' Opposition Brief to

---

(Cont'd)
an adult entertainment license for the same property is a valid requirement. There is no right, contractual or otherwise, to have both an adult entertainment license and an alcohol license on the same premises. *S.J.T. Inc. v. Richmond County*, 263 Ga. 267, 430 S.E. 2d 726 (1993).

19. *See* Respondents comments in this regard on p. 2 of this Opposition Brief.

the petition of Mukesh Shretta. *See* pp. 6-12. The distinction has no relation to nor does it contradict the rejection of the "right-privilege" dichotomy by this Court. Rather, the distinction is based on the constitutional principles of this Court set forth in *Roth* that due process is not implicated where there is no vested property right. As set forth above, this determination is based on the state or local law at issue, and in this case, the law clearly establishes that Petitioners did not have a vested right to the renewal of their licenses.

Petitioners' extreme interpretation of the due process clause would require that a government grant a license to all applicants regardless of the local requirements in existence at the time a renewal application is filed simply because the government had previously granted such licenses. In other words, Petitioners urge this Court to prohibit local governments and states from ever changing their ordinances or rules once a license is issued under an initial statute or rule notwithstanding that such licenses expire every year. It is this argument that "would work radical surgery on the due process clause" and not the rationale employed by the Georgia Supreme Court in holding that a license which expires on an annual basis confers no vested right. The jurisdictions which have determined that a vested right exist in the renewal of a license are based on state statutes which provide for perpetual duration rather than an annual duration. There is a legitimate claim of entitlement to the former which does not exist with the latter.

The holding of the Georgia Supreme Court is entirely consistent with the established precedent of this Court. Furthermore, the traditional "bundles of rights" that are inherent in property ownership are not swept away by the Georgia courts but must be balanced with the right of local governments to enact ordinances pursuant to their police powers. In this case, Petitioners' 1995 licenses which were already issued at the time

the ordinance was enacted were not suspended or revoked. Petitioners simply did not meet the requirements for obtaining both an alcohol and adult entertainment license on the same property at the time of the renewal application for calendar year 1996. Petitioners were notified of the public hearing in accordance with state law[20] and allowed an opportunity to be heard prior to passage of the ordinance. It should be noted, however, that any argument regarding the sufficiency of this notice or the public hearing cannot be considered by this Court as such argument has been previously waived by these Petitioners. *See* pp. 18-20 of Respondents' Opposition Brief to the petition of Mukesh Shretta *et al.* Nothing further was required. As this Court held in *Atkins v. Parker*, 472 U.S. 115, 129-30 (1985), "[t]he legislative determination provides all the process that is due."

Accordingly, no due process considerations have been circumvented by any party in this case. The Georgia courts applied the stringent three-prong test of *Paramount Pictures* and determined that the ordinance was constitutional. Contrary to Petitioners' assertions, the decision of the Georgia Supreme Court is not only consistent with this Court's precedent but with the holdings of other jurisdictions as well. The fact that some differences exist in the opinions of other states does not warrant review by this Court. The yardstick of *City of Renton* and the framework established in *O'Brien* and adopted by the Georgia courts in *Paramount* have proved to be adequate in protecting the due process rights of property owners such as Petitioners. The record of this case clearly reveals that the Georgia courts properly followed the guidance of this Court, and have not infringed upon any federally protected rights. Respondents certainly recognize that Petitioners are unhappy with the requirement of choosing between alcohol and adult entertainment but *Certiorari* is not warranted simply because

20. *See* O.C.G.A. § 50-14-1 — Georgia's Open Meeting Act.

Petitioners feel such choice is not economically feasible. There is no federal constitutional right to offer adult entertainment in conjunction with the sale of alcohol.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

DOUGLAS R. HAYNIE
Counsel of Record
EMILIE K. PETROVICH
HAYNIE & LITCHFIELD, P.C.
222 Washington Avenue
Marietta, Georgia 30060
(770) 422-8900

MICHAEL A. O'QUINN
BARNHART, O'QUINN
& WILLIAMS, LLP
162 Keys Ferry Street
McDonough, Georgia 30253
(770) 898-0333

Attorneys for Respondent
City of Marietta

APPENDIX A — CODE OF ORDINANCE OF THE CITY OF MARIETTA, GEORGIA, SECTION 8-5032

COUNCIL BILL NO. 400195 ORDINANCE BILL NO. 5399

AN ORDINANCE

Findings; Public Purpose; Legal Authority. (a) Based upon the experience of other urban counties and municipalities, which experiences we believe are relevant to the problems faced by City of Marietta, Georgia, and based upon a review of a report from the Marietta City Police Department summarizing the criminal activity surrounding the three (3) existing license holders within the City of Marietta, we take note of the notorious and self-evident conditions attendant to the commercial exploitation of human sexuality, which do not vary greatly among generally comparable communities within our country. Moreover, it is the finding of the City Council of Marietta that public nudity (either partial or total) under certain circumstances, particularly circumstances related to the sale and consumption of alcoholic beverages in so-called "nude bars" or establishments offering so-called "nude entertainment" or "adult entertainment", begets criminal behavior and tends to create undesirable community conditions. Among the undesirable community conditions identified with nudity and alcohol are depression of property values in the surrounding neighborhood, increased expenditure for the allocation of law enforcement personnel to preserve law and order, increased burden on the judicial system as a consequence of the criminal behavior hereinabove described, and acceleration of community blight by the concentration of such establishments in particular areas. Therefore, the limitation of nude conduct in establishments licensed to sell alcohol for consumption on the premises is in the public welfare and it is a matter of governmental interest and concern to prevent the occurrence of criminal behavior and

undesirable community conditions normally associated with establishments which serve alcohol and also allow and/or encourage nudity. To that end, this Ordinance is hereby adopted.

(b) This ordinance is also adopted pursuant to the authority granted by Article III, Section VI, Paragraph VII of the Constitution of the State of Georgia.

(c) This ordinance is further adopted to protect the public safety, health and welfare.

BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF MARIETTA, GEORGIA, THAT:

Section 1. The Code of Marietta, Georgia, is hereby amended to add section 8-5032 which shall read as follows:

> "*8-5032*
>
> a) No person, association, partnership or corporation licensed under Chapter 5 of Part 8 (8-5001 et seq.) of the Marietta City Code after the effective date of this ordinance shall serve, sell, distribute or suffer the consumption or possession of any intoxicating liquor, beer or wine or controlled substance upon the premises of any licensee. Any licensee whose license was granted prior to the adoption of this amendment shall not be subject to this amendment until December 31, 1995, at which time all licensees within the City of Marietta shall be subject to this provision,

including those licensees licensed before the effective date hereof.

b) This section (8-5032) shall not apply nor prohibit the live performance of legitimate plays, operas, ballets at mainstream theaters, concerts halls, museums or educational institutions holding a license, which derive less than twenty (20%) of its gross receipts from the sale of alcoholic beverages."

Section 2. It is hereby declared to be the intention of this Ordinance that its sections, paragraphs, sentences, clauses and phrases are severable, and if any section, paragraph, sentence, clause or phrase of this Ordinance is declared to be unconstitutional or invalid, it shall not affect any of the remaining sections, paragraphs, sentences, clauses or phrases of this Ordinance.

Section 3. All Ordinances or parts of Ordinances in conflict with this Ordinance are hereby repealed.

Section 4. This Ordinance shall become effective upon the signature or without the signature of the Mayor, subject to Georgia laws 1983, page 4119.

DATE: January 19, 1995 APPROVED:

s/ Ansley L. Meaders
ANSLEY LITTLE MEADERS, Mayor

Appendix A

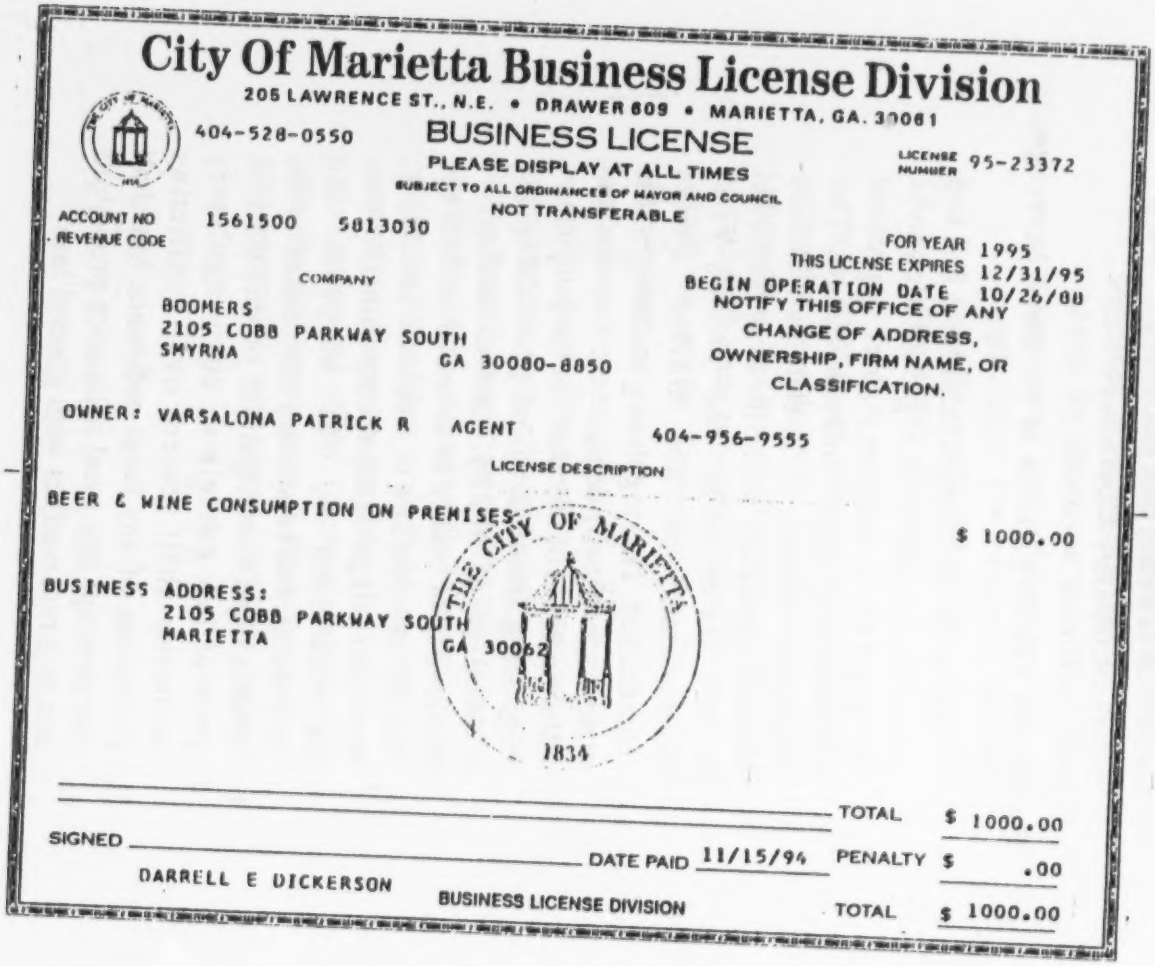
ATTEST:

s/ Sheila R. Hill
SHEILA R. HILL, City Clerk

APPROVED AS TO FORM:

s/ Douglas R. Haynie
DOUGLAS R. HAYNIE, CITY ATTORNEY

APPENDIX B — ANNUAL BUSINESS LICENSE OF VARSALONA'S ITALIAN RESTAURANT D/B/A BOOMER'S



City Of Marietta Business License Division

205 LAWRENCE ST., N.E. • DRAWER 609 • MARIETTA, GA. 30061

404-528-0550

BUSINESS LICENSE

PLEASE DISPLAY AT ALL TIMES

SUBJECT TO ALL ORDINANCES OF MAYOR AND COUNCIL

NOT TRANSFERABLE

LICENSE NUMBER 95-23372

ACCOUNT NO 1561500
REVENUE CODE 5813030

FOR YEAR 1995
THIS LICENSE EXPIRES 12/31/95
BEGIN OPERATION DATE 10/26/88

COMPANY

BOOMERS
2105 COBB PARKWAY SOUTH
SMYRNA GA 30080-8850

NOTIFY THIS OFFICE OF ANY CHANGE OF ADDRESS, OWNERSHIP, FIRM NAME, OR CLASSIFICATION.

OWNER: VARSALONA PATRICK R AGENT 404-956-9555

LICENSE DESCRIPTION

BEER & WINE CONSUMPTION ON PREMISES $ 1000.00

BUSINESS ADDRESS:
2105 COBB PARKWAY SOUTH
MARIETTA GA 30062

THE CITY OF MARIETTA 1834

TOTAL $ 1000.00

SIGNED _____ DATE PAID 11/15/94 PENALTY $ .00

DARRELL E DICKERSON
BUSINESS LICENSE DIVISION

TOTAL $ 1000.00

APPENDIX C — ARTICLE III, SECTION VI, PARAGRAPH VII OF THE CONSTITUTION OF THE STATE OF GEORGIA

GEORGIA CONSTITUTION

Paragraph VII. Regulation of alcoholic beverages.

The State of Georgia shall have full and complete authority to regulate alcoholic beverages and to regulate, restrict, or prohibit activities involving alcoholic beverages. This regulatory authority of the state shall include all such regulatory authority as is permitted to the states under the Twenty-First Amendment to the United States Constitution. This regulatory authority of the state is specifically delegated to counties and municipalities of the state for the purpose of regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages; and such delegated regulatory authority may be exercised by the adoption and enforcement of regulatory ordinances by the counties and municipalities of this state. A general law exercising such regulatory authority shall control over conflicting provisions of any local ordinance but shall not preempt any local ordinance provisions not in direct conflict with general law.

APPENDIX D — OFFICIAL CODE OF GEORGIA ANNOTATED, SECTION 3-2-7

3-2-7. Expiration and renewal of licenses generally; continuation of operations by licensee pending final approval or disapproval of application for renewal; penalty for late application for renewal; temporary permits.

(a) Except as otherwise specifically provided in this title, all licenses issued pursuant to this title shall expire on December 31 of each year and application for renewal shall be made annually on or before November 1.

(b) Any licensee making proper application, with all supporting documents, for a license to operate during the following calendar year and having filed the application prior to November 1 shall be permitted to continue to operate pending final approval or disapproval of the licensee's application for the following year if final approval or disapproval is not granted prior to January 1.

APPENDIX E — AFFIDAVIT OF COUNCILMAN FRANK T. AYERS

AFFIDAVIT OF FRANK T. AYERS

PERSONALLY before the undersigned officer, duly authorized by law to administer oaths, came Frank T. Ayers, who, after being sworn, deposes as follows:

1.

This affidavit is based upon my personal knowledge.

2.

My name is Frank T. Ayers, and I am the elected official representing Ward 6 of the City of Marietta, Georgia. I am currently the elected official for said position and was the elected official for said position on January 19, 1995.

3.

I attended the specially called meeting of the Marietta City Council on January 19, 1995, which commenced at approximately 6:00 p.m. and adjourned at approximately 10:00 p.m.

4.

At the conclusion of said meeting, I voted for the passage of Council Bill No. 400195, Ordinance Bill No. 5399, which is marked as "P-8" in my deposition.

Appendix E

5.

My vote on this Ordinance was an act carried out by me in my official capacity as the elected official for Ward 6 of the City of Marietta, Georgia and my vote was within my official duty as such elected official.

6.

My vote was taken in good faith and was not done or taken oppressively, maliciously, or corruptly. In voting on said Ordinance, it was not my intention to cause injury or damage to any specific person, firm, entity or organization; rather, it was my intention to adopt an Ordinance having general application throughout the City of Marietta.

7.

In voting on said Ordinance, I did not receive any pecuniary gain as a result of said vote, other than the normal salary set forth in the Marietta City Charter.

8.

In voting on said Ordinance, I was acting in a legislative capacity and performing a legislative function.

9.

In voting on said Ordinance, I relied upon the studies contained in the Record and contained in my deposition. I found said studies to be relevant to the City of Marietta, the problems faced by the City of Marietta and the problems addressed in the

Ordinance. I also relied upon the testimony and evidence presented at the public hearing. I also relied upon the advice of the City Attorney and the Constitutional Amendment approved by the voters of this State on November 8, 1994.

10.

My only motives for voting for said Ordinance are those stated in the preamble of said Ordinance. My personal feelings on any subject matter contained in said Ordinance did not enter into my vote.

This 5 day of December 1995.

s/ Frank T. Ayers
FRANK T. AYERS

Sworn to and Subscribed before me this
5 day of December, 1995.

s/ Shaun Renae Gee
Notary Public